

M. YUSUF M. BALUCH

II

QUESTIONS & ANSWERS

ISLAMIC JURISPRUDENCE



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M. YUSUF M. BALUCH

ISLAMIC JURISPRUDENCE

Based on
The
Principles of
Muhammadian Jurisprudence

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Book
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ISLAMIC JURISPRUDENCE

List of Questions

CHAPTER 1

HISTORY OF GROWTH OF ISLAMIC LEGAL SYSTEM

- Q. 1. Define Islamic Jurisprudence? **15**
- Q. 2. Give a brief account of the history and development of Islamic Jurisprudence in its various periods? **17**
- Q. 3. Write a brief account of the "Period of Legislation" of the Islamic Jurisprudence? **17**
- Q. 4. Was Islamic Jurisprudence influenced by Roman Jurisprudence? Give full reasons. **18**
- Q. 5. Islamic Jurisprudence is more scientific than the Western Jurisprudence? Discuss. **21**

CHAPTER 2

DEVELOPMENT OF FOUR SUNNI SCHOOLS OF ISLAMIC JURISPRUDENCE

- Q. 6. Write short notes on the development of the four Sunni Schools of Islamic Jurisprudence? **24**
- Q. 7. Write a note on Imam Abu Hanifa? **25**

OR

Describe the role/contribution of Imam Abu Hanifa in compilation of fiqh?

OR

Discuss the role of Imam Abu Hanifa in the codification of Islamic law. Enumerate the Salient features of his fiqh?

[2001A, 2002A, 2003S]

OR

What is Ijtehad and what is its importance in Islamic Law and Islamic Legal System?

OR

Define and discuss Ijtehad as a significant source of Islamic Law with reference to contemporary world?

OR

Define and discuss Ijtehad as a source of Islamic Law?

OR

What is Ijtehad? How it can be distinguished from Taqlid?

[2000A, 2000S, 2001A, 2001S, 2002A, 2003A, 2003S, 2004A, 2004S, 2005A]

Q. 25. What are the qualifications of a Mujtahid? Discuss?

74

Q. 26. Write a note on Istehsan?

76

OR

Discuss and elaborate Istehsan?

[2000A, 2000S, 2003A, 2005S]

Q. 27. Discuss and elaborate the theory of Istehsan and Qiyas under Islamic Law?

79

Q. 28. Discuss and elaborate Istidlal?

82

[2000A, 2005S]

Q. 29. What is meant by Masahlih-ul-Mursala. Describe the conditions for their validity?

84

Q. 30. Write brief notes on the following:

86

(a) Istisna (b) Rajat.

Q. 31. Write a note on Taqlid?

87

[2001S, 2003S, 2005A]

Q. 32. Define Custom. What is its importance in Islamic Law? Enumerate the Major Customs of Arabs adopted by Islam. 89

OR

Describe the role of Custom in Islamic legislation with reference to Arabian Customs adopted by Shariah?

OR

Define Custom as a source of law in Islam. What is the status of pre-Islamic Customs?

OR

Define Custom and discuss its importance in Islamic Law?

[2000A, 2001A, 2001S, 2002A, 2002S, 2004A, 2004S, 2005S]

CHAPTER 4

ACTS, RIGHTS AND OBLIGATION

Q. 33. How are the acts classified by Muslim Jurists? Discuss each class fully? 94

Q. 34. Into how many classifications have the rights been placed by Muslims Jurists? Discuss each class fully? 96

Q. 35. What are public and private rights? Discuss. 100

OR

What is meant by public and private rights. Which one is more important?

[2000A, 2000S, 2001A, 2002A, 2003S, 2004A]

Q. 36. Into how many Classifications have the Obligations been placed by the Muslim Jurists? Discuss each class. 104

CHAPTER 5

LEGAL CAPACITY

Q. 37. What is legal capacity? How it is defective and what are the consequences of its defect? 106

OR

What is legal capacity? What factors may cause defect in it and what are the consequences of this defect?

[2000A]

CHAPTER 6**OWNERSHIP AND
POSSESSION**

Q. 38. Define and discuss the concept of Ownership under Islamic Civil Law. What are the modes of acquiring and losing ownership? 111

OR

What are modes of acquiring Ownership and losing it in Islam?

[2000A, 2000S, 2001S, 2003A, 2004A, 2005A]

Q. 39. Write a short note on the concept of Contract in Islam? 114

Q. 40. Define contract. What are the essentials of a valid contract in Islamic Law? 116

OR

Define contract. What are the ingredients of a valid contract in Islamic Law?

OR

Discuss the ingredients of a valid contract under the Islamic Civil Law?

OR

Define contract according to Islamic law. What are its essential ingredients?

[2000A, 2001A, 2001S, 2002A, 2002S, 2003S, 2004A, 2005A]

Q. 41. Define 'Mal' and what properties are included in 'Mal'? 119

Are wines and pigs included in Mal and can they be owned by a Muslim ?

CHAPTER 7

CRIME AND TORT

Q. 42. Briefly discuss the remedies for Torts as recognised by the Islamic Jurisprudence? **121**

Q. 43. Discuss briefly the salient feature of Islamic Criminal Law? **122**

[200A]

Q. 44. What are the theories of Criminality in Islam? **123**

Q. 45. What are different theories of punishment in Islam? **126**

Q. 46. What is the object of punishment in Islam. What are different kinds of punishment in Islamic Law? **127**

[2004S, 2005S]

Q. 47. What crimes are regarded as Hudood Crimes. Discuss in detail? **132**

OR

Define and discuss all the seven crimes of Hudood in detail?

OR

What are the crimes of Hudood in Islamic law? Discuss.

OR

Discuss all the Hudood crimes in detail?

[2000S, 2001A, 2001S, 2002S, 2003A]

Q. 48. Discuss Hadd and Tazir as punishments in Islam? **135**

OR

Discuss the difference between 'Hadd' and 'Tazir'?

OR

Define and distinguish between Hadd and Tazir?

[2000S, 2001A, 2001S, 2002S, 2003S, 2004A, 2005A]

Q. 49. Define and discuss the difference between Qisas and Diyat in Islamic Law? Discuss. 138

CHAPTER 8

PROCEDURE AND EVIDENCE

Q. 50. What are the Salient feature of Islamic Law of Evidence? 141

Q. 51. Write the importance and kinds of evidence under the Islamic law. Who can testify and who cannot? 143

[2001S]

Q. 52. What are the qualifications of a competent Witness? Discuss the status of Women as a Witness? 146

OR

Who is a competent Witness under Islamic Law?

OR

Discuss the qualifications of a competent Witness under the Islamic Law of Evidence?

[2000A, 2000S, 2001A, 2002S, 2004A, 2004S, 2005S]

Q. 53. Discuss in detail the testimony of women under the Islamic Law? 149

OR

Discuss the Status of women as competent witness under Islamic Law of evidence?

OR

Can a woman be competent witness?

[2002S, 2003A]

CHAPTER 9

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Q. 54. Discuss main features of Constitutional and Administrative Law of an Islamic State? 151

Questions & Answers

11

Q. 55. What is Judicial System of an Islamic State? **152**

OR

Discuss the Judicial System of an Islamic State?

[2003S, 2004S, 2005S]

Q. 56. What are the qualifications of a Qazi? **155**

OR

What are the Qualifications of Qazi in an Islamic State?
Discuss.

[2003S, 2004S]

Q. 57. What are the traditional sources of revenue of an Islamic state. Can other taxes be levied in an Islamic state? **157**

OR

What are the traditional sources of revenue of an Islamic State?

OR

What are the sources of revenue of an Islamic state? discuss?

OR

What are the main sources of revenue of an Islamic state?
Explain.

[2000S, 2001A, 2001S, 2002A, 2002S, 2003A, 2003S, 2004A, 2004S, 2005A]

CHAPTER 10

SOVEREIGNTY

Q. 58. Explain the concept of Sovereignty in Islam? **163**

OR

Explain sovereignty in Islam?

[2000S, 2004S]

CHAPTER 11

SHURA SYSTEM OF ISLAM

Q. 59. Shura is an important organ of an Islamic State. Define and discuss its role under the Islamic Constitutional Law? **167**

OR

Discuss the importance and role of Shura in an Islamic State in the light of Quranic verse?

OR

Shura is an important pillar in Islamic Constitutional Law? Discuss.

OR

Discuss the characteristics of Islamic System of Shura?

OR

What are the salient features of Islamic System of Shura?

[2000S, 2001A, 2001S, 2003A, 2003S, 2005A, 2005S]

CHAPTER 12

CONCEPT OF THE ISLAMIC STATE

Q. 60. Discuss the concept of State in Islam? 172

[2005S]

Q. 61. Write a detail note on the qualifications of Caliph, his duties and powers? 176

OR

What are the qualifications for Head of an Islamic State?

[2003S]

CHAPTER 13

LAW REGULATING RELATIONS BETWEEN MUSLIMS AND NON-MUSLIMS

Q. 62. Discuss the concept of Jihad in Islam. What acts are permissible in war? 180

OR

Why Jihad is Waged? What acts are permissible and what not during Jihad?

OR

What acts are permissible and what not during Jihad?

OR

Define and discuss jihad. How is it waged?

OR

What acts are permitted under the Islamic International Law during the war?

OR

What acts are forbidden by Islamic Law in the conduct of war?
Discuss

OR

How and when war can be waged?

[2000S, 2001A, 2001S, 2002S, 2003A, 2004S, 2005A, 2005S]

Q. 63. What are the lawful wars under the Islamic International Law? **183**

Q. 64. What acts are permissible and what not during Jihad? **185**

Q. 65. Some Muslim jurists divide the world into two parts. Darul Harb and Darul Islam. What are the consequences of such Division? Discuss. **188**

OR

Discuss and distinguish between Darul-Islam and Darul Harb?

[2000S, 2002A, 2003S, 2004A, 2004S, 2005A]

CHAPTER 14

MUSLIM INTERNATIONAL LAW

Q. 66. Write a detail note on Muslim International Law? **192**

- Q. 67. Write a note on Treatment of Enemy persons? 195
- Q. 68. Write a note on Prisoners-of-War? 197
- [2002S, 2003A]
- Q. 69. Write a note on Treatment of Prisoners of War? 200
- [2001S]
- Q. 70. What is the concept of nationhood in Islam? What is meant by two Nation Theory? 202
- Q. 71. Islam has got its unique International System. Discuss in details? 206

OR

Discuss the contribution of Islam to the Internationalising of human society?

[2000A, 2005S]

ISLAMIC JURISPRUDENCE

CHAPTER 1

HISTORY OF GROWTH OF ISLAMIC LEGAL SYSTEM

Q. 1. Define Islamic Jurisprudence?

Ans. ISLAMIC JURISPRUDENCE : The dictionary meaning of the term "fiqh" is understanding or knowledge. It is used in the same sense in the Holy Qur'an. In Shariat terminology the term "fiqh" is confined to knowledge.

According to Imam Abu Hanifah fiqh is a knowledge of what is for a man's self and what is against a man's self.

It is the science of rights and obligations of man.

Imam Malik defined fiqh as "The science of commands of the Shariat in particular matters deduced by the application of a process of reasoning."

Imam Shafi'i gives the following definition:--

"Fiqh is the knowledge of the laws of Shariat relating to men's acts and derived from specific sources."

The object of fiqh in the early days of Islam was to get a knowledge of the next world. But Imam Ghazali considers that "it is now confined to the science of the rules of law."

The author of Tauzih defines fiqh as "the knowledge of laws of the Shariat which are intended to be acted upon, and have been divulged to us by revelation or determined by concurrent decisions of the learned, such knowledge being derived from the sources of law with the power of making current deductions therefrom."

Syed Ghulam Haider Shah in his book "Islamic Jurisprudence" has defined "Fiqh is the knowledge of one's acts and things which are permissible for a man to do any things which are forbidden to him including acts of commission and omission. In this sense it is a science which points out the extent and limits of man's liberty. In other words it is the science of rights and obligations."

"Shariat" says Sir Abdur Rahim, "which may be translated as the Islamic Code, means matters which would not have been known but for the communication made to us by the law-giver".

Fiqh is an important science according to the Qur'an and Sunnah. Muslims are persuaded to study it.

Then there is a very relevant and explicit verse which hints the significance of fiqh.

This verse shows:

- (i) That deduction of propositions is fiqh;
- (ii) Only a few among the Companions could deduce law;
- (iii) That deduction is always with knowledge;
- (iv) That learned are jurists and not the so-called persons authority.

Fiqh may also be equated with Hikmat.

The importance of learning fiqh may also be found in a Hadith which shows that fiqh is a blessing of God.

Sh. Wakihi used to say that the people would not be benefited with Hadith without knowing fiqh.

The Qur'an says that they may gain understanding in religion. It is obvious that during the days of the Holy Prophet the term "fiqh" was used in its wider sense. Besides its legal aspect it also covered theological, economic and political aspects. Its original meaning changed later on when it became narrow. Then it began to be applied to the legal problems.

Fiqh is distinct from Shariat. "Shariat is the wider circle, embraces in its orbit all human actions. Fiqh is the narrow one and deals with what are commonly understood as legal aspects. The Holy Qur'an says:

"For each we have appointed divine law and traced out way".
In other words Shariat is a Code of Islamic Law.

The path of Shariat is laid down by God and His Prophet. The edifice of fiqh is erected by human endeavour. In Fiqh an action is either legal or illegal; in Shariat there are various grades of approval and disapproval, but the Muslim Doctors very often use the term synonymously; for the criterion of human actions; whether in the Shariat or Fiqh is the same seeking the approval of Allah by conforming to an ideally perfect Code.

Q. 2. Give a brief account of the history and development of Islamic Jurisprudence in its various periods?

Ans. HISTORY AND DEVELOPMENT OF ISLAMIC JURISPRUDENCE : History of Islamic Legal System, subsequent to the promulgation of Islam and the Muslim legal science, is divisible into four distinct periods :

The first period commenced with the Hijrat or retirement of the Prophet to Madina (A.D. 622) and ended with his death (A.D. 632). This had been rightly called the legislative period of Islam, when laws were enacted by the divine legislator and promulgated in the words of the Qur'an, or by the precepts of Prophet Muhammad (peace be upon him). These are the texts upon which, as their foundation, the superstructure of the four Sunni Schools has been constructed.

The second period extends from the date of the Prophet's death to the foundation of different schools of jurisprudence, and would cover, roughly speaking, the time of the Companions of the Prophet *Ashab* and their successors *Tabi'un*. It was the age as has been observed mainly of collection and of interpretation and extension of laws by collective deliberations.

The third period was marked by a theoretical and scientific study of the law and religion, and it was then that the four Sunni Schools of Jurisprudence were established. It commenced about the beginning of the second century of the Hijra and practically ended with the third century.

Since then there has been no independent exposition of Islamic Law. And jurists have been engaged within the limits of each School to develop the work of its founders. This may be called the fourth period in the history of Islamic Law and cannot properly be said to have yet come to an end. An elaborate classification has been made of the jurists of this period and their work. But it will be more appropriate to deal with that question in any detail in connexion with the doctrine of *taqlid*.

Q. 3. Write a brief account of the "Period of Legislation" of the Islamic Jurisprudence?

Ans. PERIOD OF LEGISLATION : The history of Islamic Law subsequent to the promulgation of Islam and of the Muslim

legal science is divisible into four distinct periods. The first period commenced with the Hijrat or retirement of the Prophet to Madina (A. D. 622) and ended with his death (A. D. 632). This has been rights called the legislative period of Islam when Laws were enacted by the divine legislator and promulgated in the words of the Qur'an by the precepts of Prophet Muhammad (peace be upon him). These are the texts upon which as their foundation the superstructure of the four Sunni Schools has been constructed.

Qur'an is the name of the collection of those revelations which were made to Muhammad (peace be upon him) when he was vested with the office of the Prophet and Messenger of God. The revelations were made in God's own words as containing his wishes and commands. It texts which existed from eternity was communicated from time to time in pieces called *ayat* or verses. Many of the verses laying down rules of law were revealed with reference to cases which actually arose. Sometimes God in the wisdom repealed some previous injunction and laid down others in their stead more suitable to the needs of men.

The other sources of the Ordinance of God during the life-time of the Prophet were his precepts of *Ahadith*. Often questions arose for decision for the solution of which no direct revelation was forthcoming or certain points had to be explained and made clear. The pronouncements made by the Prophet on all such occasions are known as *Ahadith* or precept and are regarded as of sacred authority. His dicta in all matters of law and religion were inspired and suggested by God though expressed in his own words while the Qur'anic texts were God's both in language and thought. The Prophet's precepts and usages were likewise guided by God and in the same way as the texts of the Qur'an furnished an index of what was right and lawful. His approval or disapproval was sometimes implied from his conduct. If, for instance, a certain usage or course of action was followed by the Muslims within his knowledge, and the Prophet expressed no disapproval thereof, its legality was presumed. Similarly, if the Prophet studiously avoided a certain course of conduct, it has to be presumed that he disapproved of it.

Q. 4. Was Islamic Jurisprudence influenced by Roman Jurisprudence? Give full reasons.

Ans. INFLUENCE OF ROMAN JURISPRUDENCE ON ISLAMIC JURISPRUDENCE : Islam being a universal religion propounded comprehensive principles of municipal laws. The history

of Islamic Jurisprudence is divisible in four distinct periods. The first period which can rightly be called the legislative period started from Hijrat and ended on the death of the Holy Prophet. The second period is the period of Khulafa Rashidin and Tabian. The third period is the period of scientific and theoretic study of law, *i.e.*, the time when four Sunni schools of thought were established. The fourth period starts from their death onwards.

The Qur'an and *Hadith* were the principal guides during the first two regimes, when the Qur'an was revealed and collected and when people sought guidance directly from the Prophet and his Companions. During the third period when jurisprudence was being theoretically and scientifically studied, it is gathered that Muslim jurists also consulted and studied other jurisprudence and laws. It was the Abbasides who patronized on a very large scale, the Jurists, and other learned people. For a short while, during this period, the study of Greek and Roman Laws came in to vogue, as jurists were facing some practical concerns of life. The students who are interested in comparative jurisprudence will find some points on which the Muslims and Roman jurisprudence resemble. But it must be kept in mind that Muslim jurists themselves do not even allude to Roman jurisprudence in their treatises and works and their theories exclude the recognition of it as being a factor in moulding Islamic jurisprudence. It has not at all been acknowledged nor has even an illusive reference been made to this point. Hence it is difficult to determine with any degree of certainty the extent of such influence of Roman Laws on Islamic Laws and one cannot say how much obligation Muslim jurists owe to Roman jurists.

In the end we can only say that there are some points of resemblance between Islamic Laws and Roman Laws and their jurisprudence, but they have not clearly been stated or referred to by Muslim jurists and it is difficult to determine with authority the extent of Roman influence on Islamic jurisprudence and it can be said that there may be some influence, but not much; it is only to a little extent because during the third period of development of the Islamic legal system, perhaps, study of Roman literature and science were considerably in vogue.

From a comparative study of Islamic and Roman systems we find superficial similarities with marked contrast at a deeper level. Examples are as follows :

(i) **Slavery--Roman Law** : Justified on the ground that a person defeated in war had no right to his life; so slave was actually a living tool purchased by the victor by sparing his life. Slavery was an established economic institution

Islamic Law : Slavery accepted as a necessary evil only in case of prisoners of war which were to be released by grace or with ransom money after the cessation of war. Slavery was a defect in legal capacity caused by operation of law as a punishment for fighting against Islam. It was the Holy Prophet who first initiated the universal movement for the abolition of slavery. According to Qur'an (90, *Sura Balad*) a religious duty is cast on the "Baitul Maal" to set free the slaves.

(ii) **Marriage--'dower'** was essential in both systems, but in Roman system dower was paid at marriage by wife or one of her family members to the husband, and in Islam it is *vice versa*. Only when the Muslim wife asks divorce, she has to leave her dower in favour of her husband.

In Roman Law, the matrimonial expenses were shared by both the spouses. Expenses contributed by the wife's side were called 'dos'. The contribution by the husband's side was called 'Donatio Ante Nuptias'. Later on Emperor Justinian laid that husband could have the power to settle his share of the matrimonial expenses "during" (and not "before") the marriage. This was called 'Donatio Propter Nuptias' (*vide supra* Mahmood J's remarks). In Islam dower is payment by husband not for marriage expenses but as a token of respect for wife.

(iii) **Gifts** : Take the special case of 'Donatio mortis causa' of Roman Law. It was a gift made, in "anticipation", of "someone's" death or even of the donee's death. In Islamic Law, a gift (*donatio*) in death illness (*maraz-ul-maut*) can only be made by the donor who is in subjective "apprehension" of "his own death". *Donatio mortis causa* operated only after the death of the donor, and this gift could be made by donor of his entire property. Whereas, a gift in death illness, in Islamic Law, operates at once, but any alienation beyond 1/3 of donor's assets is void.

(iv) **Wills** : Roman Law required wide publicity of "Will" when made, required witnesses and allowed bequest to heirs. Islamic Law encourages will-making but no bequest to heir is valid.

Q. 5. Islamic Jurisprudence is more scientific than the Western Jurisprudence? Discuss.

Ans. ISLAMIC JURISPRUDENCE V. WESTERN JURISPRUDENCE : Islamic Jurisprudence is more scientific than the Western Jurisprudence. Islam is a religion which respects the human nature that is why it is termed as:

The nature of Allah, in which he hath created man. There is no altering (the laws of) Allah's creation. That is the right religion, but most men know not (30:30).

Islam acknowledges all the previous instructions imparted by Prophets because they also preached. This religion is eternal. Islam claims that its religious education is protected. The Quran is without any interpolations. Moreover this religion encourages mediation.

In the early days of Islam a class of such erudite Scholars came into being who carried a strenuous research work in the religious sphere. The Muslim scholars worked very hard for Jurisprudence. Especially Imam Abu Hanifa along with his disciples compiled judicial works which are unparalleled in the world. Even the British jurists could not compete this school. This is why Imam Abu Hanifa is regarded as one of the greatest jurists. The other three Imam, i.e., Malik, Shahfi's and Ahmad Ibn Hambal were also endowed with talents of an exceptional nature. They enjoyed a great reputation as jurists.

Due to combined efforts of the above noted Imams it can be safely said that Islamic Jurisprudence has become more scientific than the British Jurisprudence. Even Edmund Burk, the famous British Statesman in his well known impeachment of Warren Hastings had declared in unequivocal terms that a Muslim law and Jurisprudence were the loftiest in the world. Now we may enumerate the points of preference.

POINTS OF PREFERENCE

(1) **LEGISLATOR :** Islamic Jurisprudence is revealed from God, whereas Western Jurisprudence is not revealed but manmade.

(2) **BASE :** The base of Islamic Jurisprudence is revelation, whereas the base of Western Jurisprudence is not revelation but Roman law.

(3) **COMPREHENSIVENESS** : Islamic Jurisprudence is very comprehensive and according to the needs of every age. Whereas Western Jurisprudence is deprived of this characteristics. The reason is that it is a creation of human mind.

(4) **TIME PERIOD** : Islamic Jurisprudence is practicable for all the times to come. There is no time period fixed for it, whereas Western Jurisprudence is not practicable for all the times to come. It is practicable only for a specific period and afterwards it has to change.

(5) **GUIDANCE** : The Islamic Jurisprudence provides guidance for both religious and worldly affairs. Whereas Western jurisprudence provides guidance only and only for worldly affairs.

(6) **SIMPLE AND PLAIN** : Islamic Jurisprudence is very simple and plain, whereas Western Jurisprudence is not simple and plain but there exist some complications and irregularities in it.

(7) **ETHICS** : Islamic Jurisprudence lays much emphasis on ethics, as an ideal society can only be established with the help of it. Whereas in Western Jurisprudence Ethics have no value.

(8) **BASIC SOURCE** : The basic source of Islamic Jurisprudence is Quran and Sunnah, whereas the basic source of Western Jurisprudence is Custom.

(9) **NEUTRAL** : The Islamic Jurisprudence is a neutrally revealed principle from God therefore it is free from any interest. Whereas it is difficult to say this about Western jurisprudence as it is a man made and there is a possibility of any interest in it.

(10) **CONTRADICTIONS** : As the principle of Islamic Jurisprudence revealed by God, therefore it is pure from differences and contradictions. Whereas Western Jurisprudence is not pure from differences and contradictions.

(11) **REPEAL** : As the principles of Islamic Jurisprudence has been derived from Quran and Sunnah and now it cannot be replaced at all. Whereas in Western Jurisprudence old principles have been replaced by new principles therefore there exist a concept of repeal in Western Jurisprudence.

(12) **AMENDMENT** : There is no room for amendment in the Islamic Jurisprudence. Whereas there is a room for amendment in the Western Jurisprudence.

(13) PURE FROM MISTAKES : The Islamic Jurisprudence is pure from mistakes. The reason for its being pureed from mistakes is that it has been revealed by God. Whereas Western Jurisprudence is not pure from mistakes. The reason of its not being pureed is that it has been created by men.

(14) RESPECT : The Islamic jurisprudence has been respected by the people by heart and soul. Therefore there is no need to enforce it with force. Whereas western jurisprudence have not been respected with heart and soul. The reason for disrespect is that it is not from God but by men.

(15) APPLICATION : The Application of Islamic Jurisprudence is not on any particular country or area but on every Muslim wherever he may live. Whereas the application of Western Jurisprudence is limited only to particular area of Europe.

The above mentioned points of preference are good enough to show that Islamic jurisprudence is more scientific than Western Jurisprudence.

CHAPTER 2

DEVELOPMENT OF FOUR SUNNI SCHOOLS OF ISLAMIC JURISPRUDENCE

Q. 6. Write short notes on the development of the four Sunni Schools of Islamic Jurisprudence?

Ans. SUNNI SCHOOLS : It was during the reign of the Abbasides that the four *Sunni* Schools of Law were founded. The principles of these schools are substantially the same and they differ from each other merely in matters of details. They are classed in contradistinction to the only other school of law, i.e., *Shia* school, though the differences even between *Shias* and *Sunnis* centre more round questions relating to political events of the past rather than to any general principles of law or Jurisprudence. The following are the four *Sunni* Schools :--

HANAFIS : This school was founded by Imam Abu Hanifa Numan Ibn Thabit who was born in the year A.H. 80 and died at an advanced age of eighteen years after the Abbasides came into power. He was known as the upholder of private judgment. He also gave prominence to the doctrine of *Qiyas* and assigned prominent position to *Istihsan*. He set up a committee to discuss questions on jurisprudence and it took thirty years for the code to be completed. The entire code has now been lost, no doubt an irreparable loss to Islamic jurisprudence. It is a very important school and Muslims of Pakistan, India, Afghanistan and Turkey are mostly Hanafis and the followers of this school are also largely found in Egypt, Arabia and China.

MALIKIS : At Madina a great jurist arose in the person of Malik Ib Anas. Malik was born in A. H. 95 at Madina and there he studied and taught and did all his work. In his times he was looked upon as the highest authority on *Hadith*. He was not only a traditionist but a Jurist and founded a School of Law. The Moors of Spain belong to this school and his numerous followers are still in Northern Africa. His doctrines were not, however, essentially different from those of Abu Hanifa.

SHAFIS : Imam Shafi was born in Palestine. He attended lectures of Imam Muhammad and was the pupil of Imam Malik. At an early age he delivered lectures on jurisprudence. He adopted the

middle course between Imam Abu Hanifa and Malik in the use of Traditions and analogy. He wrote a treatise on *Usul*. Egypt is the strongholds of his doctrines but his followers are to be found in the parts of Africa, Arabia, Pakistan and India.

HAMBALIS : Imam Ahmed bin Hambal founded the fourth and latest School of Law. He was born at Baghdad (A. H. 164) and studied under different masters including Imam Shafi. He was more a traditionist than a jurist. He was a man of great piety and uncompromising opinions. He was prosecuted by Caliph Mamun but he refused to conform to those that had found favour in Court. His followers were also prosecuted from time to time and now his school consists only of a few followers in certain parts of Arabia.

Q. 7. Write a note on Imam Abu Hanifa?

OR

Describe the role/contribution of Imam Abu Hanifa in compilation of fiqh?

OR

Discuss the role of Imam Abu Hanifa in the codification of Islamic law. Enumerate the Salient features of his fiqh?

Ans. IMAM ABU HANIFA : The brief biography and services of the founder of Hanafi school of thought and great jurist Imam Abu Hanifa is an under.

(1) BRIEF BIOGRAPHY

(i) Name : His name was Abu Hanifa Numan bin Thabit.

(ii) Birth : He was born at Kufa in Iraq in 80 of Hijra or A.D. 699 during the Bani Umayyah period.

(iii) Profession : His father was textile merchant. So he adopted that profession.

(iv) Education : He first studied Scholastic divinity, but soon abandoned it in favour of jurisprudence. He attended the lectures of Jafar as Sadiq and of Hammad. The traditionist from whom he heard traditions were Ash-Shabi, Qatadah, Al-A.mad and other men of eminence in that branch of learning.

(v) **Intelligence** : Abu Hanifa was endowed with talents of an exceptional nature and had the true lawyer's gift of detecting nice distinctions. He possessed remarkable powers of reasoning and deduction which combined with the resources of a retentive memory and clear understanding, brought him into rapid prominence as a master of jurisprudence.

(vi) **Death of Imam Abu Hanifa** : Imam Abu Hanifa was died in 150 Hijri, in prison. It is said that he has been poisoned at the instance the Caliph. He was held in such esteem that his funeral prayers, it is reported, were said for ten days and on each day about fifty thousand people attended.

(2) **JURISTIC THOUGHTS AND THEORIES** : The juristic thoughts and theories of Imam Abu Hanifa are as follows.

(i) **Faith on Quran and Sunnah** : Imam abu Hanifa had great faith on Quran and Sunnah. In the presence of Quran and Sunnah he gave no value to the sayings of others as well as of himself. He accepted the orders and laws mentioned in the Holy Quran and Sunnah without any debate.

(ii) **With relation to Hadith** : Imam Hanifa considered Sunnah the second source of fiqh after Quran. He declared Khabar Mutwattar orbit of faith. About his approach towards Aahdith it is said that he was very discrete in accepting them; in fact he was very strict in this respect and applied several tests for the verification of authentic traditions. It is said that he felt justified in acting upon eighteen traditions only out of the great mass that was then in vogue.

(iii) **With relation to Ijma** : Imam Abu Hanifa was the one who extend the concept of ijma to all ages and not just confined it to the period of the companions and their successors.

(iv) **With relation to Qiyas** : Imam Abu Hanifa was very careful in relation to Qiyas. He used this doctrine only at that time when he found nothing in Quran, Sunnah and sayings of Sahaba about a problem which he had to face.

(v) **With relation to Istehsan** : He also propounded the doctrine of Istehsan.

(vi) **With Relation to custom** : Imam Abu Hanifa also recognised the authority of local customs and usages as guiding of the application of law.

(3) JURISTIC SERVICES : Imam Abu Hanifa rendered great juristic services in the domain of fiqha. He was the first to have introduced Fiqah as a Science. He has solved more than 83,000 juristic problems.

In the work which Abu Hanifa did in the domain of fiqah, he was assisted by many disciples. He also instituted a Committee consisting of forty men from among his principal disciples for the codification of laws.

Of his Committee Yahya Ibn Abi Zaid, Hafs ibn Ghiyath, Abu Yusuf, Daud at- Tai, Habban and Mandal were men of great reputation as Traditionists, Zafar was noted for his power of deducing rules of law and Qasim ibn Nuim and Muhammad were great Arabic scholars.

The Committee used to discuss any practical and theoretical question that arose or suggested itself and the conclusions which they agreed upon after a full and free debate were duly recorded. It took thirty years for the code to be completed but each part as it was finished was circulated broad cast. The entire code, however, has now been lost or destroyed which indeed is an irreparable loss to the cause of Islamic Jurisprudence.

(4) OFFER FOR THE OFFICE OF CHIEF QAZI : In the last Stages of Bani Umayyah, Ibn Habaireh the Governor had offered him the office of Chief Justice, which he declined. Due to his refusal he was subjected to ill treatment. However once again Abu Jaffer offered him the post of Chief Qazi which he similarly declined. The reason why he declined is presumed to be his personal belief that an official could not hold and practice independent views.

(5) SALIENT FEATURES OF HANAFI FIQAH : The salient features of Hanafi fiqah is as under.

- (1) It is very close to human wisdom and thoughts. Human nature has also been kept in view in it.
- (2) It is without any complications and difficulties. It has been codified in easy form so that people may act on it without facing any new problem.
- (3) In Hanafi Fiqah, practical point of view has been given great importance. in trade and transactions.

- (4) In Hanafi Fiqah personal freedom has been given great value. For instance, an adult woman can perform her Nikhah without the permission of her wali.
- (5) Fiqah Hanafi is a balanced Fiqah, in it, moderation has been kept in view and avoided from Afrat-o-tafret.
- (6) Fiqah Hanafi is in consonance with Nasoos Shariat. In it no such matter has been discussed which is contrary to Quran and Sunnah.
- (7) In Fiqah Hanafi, solution of those problem has also been given which might arose in future.

Q. 8. Write a note on Imam Malik?

Ans. IMAM MALIK : The brief biography, juristic thoughts and theory and services in the codification of fiqh of the founder of the Maliki School of thought are as under.

(1) BRIEF BIOGRAPHY

- (i) **Name :** His name was Malik bin Anas Asbahi al Arabi.
- (ii) **Birth :** He was born in 95 of Hijra at Madina.

(iii) **Education :** He studied jurisprudence from Rai Abdal Rahman and Traditions from Nafi. Al-Zuhri, Abu-al-Zinad and Yahya Ibn Said al Ansari. He was so well versed in traditions that he was considered an authority on it and was approached for his Fatwas. He was a tutor to Imam Shafi, who was impressed by his knowledge and personality. At the age of seventeen, he began his career as a lecturer on the Fiqah and Traditions. He himself says, I began to teaching when seventy Shaykhs had approved that I was qualified to do so. He was universally acknowledged not as jurist but also as traditionist.

(iv) **Intelligence :** He was very intelligent. Once he appeared in the Majlis of Imam Zuhuri with his tutor Rabia, on that day Imam Zuhuri had taught 40 Ahadith to his pupils. On the very next day when he again went in the Majlis then Imam Zuhuri asked his pupils take them those Ahadith which I have taught to you yesterday so that I may judge whether you have benefited from them or not. At this occasion, Rabia said there is only one person in the Majlis from whom all these Ahadith can be listened and that is Imam Malik. In the recognition of his intelligence Imam Shafi says that he was a glittering star of the science of traditions.

(v) **Death** : He was died in Madina in 179 A.H.

(2) **JURISTIC THOUGHTS AND THEORIES** : The juristic thoughts and theories of Imam Malik are as follows.

(i) **In relation to Quran** : Imam Malik considered Quran superior in the inference of juristic problems. He recourse to Sunnah only when he did not find solution of any problem in Quran.

(ii) **In relation to Sunnah (Khabar-Wahid)** : He accepted Sunnah of the Holy Prophet as the second source of Islamic law. He lays down that individual narrations should not be contrary to the practice of the people of Madina. According to him, if an individual narration is contradicting such practice then it is not a legally valid proof. Moreover he said about Sunnah that "Sunnah is Safin-i-Nooh whoever sit in it remained survive and whoever not be destroyed.

(iii) **In relation to sayings of Companions** : He gave priority to the sayings of companions over Qiyas. Where an individual saying of any companion is against the Ijma-e-Madina, he gave it up.

(iv) **In relation to Fatwas** : He did not give Fatwas in presumptive problems. Where he felt himself unable to solve any problem, he clearly says that I do not know about it. And in problem where there is possibility of two Fatwas, there he narrated both of them.

(v) **In relation to Ijma** : He considered Ijma third source of Islamic law after Quran and Sunnah. He relied upon only the Ijma of Ahle-Madina.

(vi) **In relation to Qiyas** : He upheld the exercise of Qiyas when the other sources failed him.

(vii) **In relation to Istehsan** : He has upheld the doctrine of Istehsan in some of his decisions. He introduced the doctrine of public good and also added Istidlal as fifth source of Islamic Law.

(viii) **In relation to custom and usages** : He was much in favour of usages and customs of Madina. He attached a preponderating weight to them, relying on the presumption that they must have been transmitted from the time of the Prophet.

(3) **SERVICES IN THE CODIFICATION OF FIQAH** : He had codified a book of Ahadith named Al-Mawatta. This is an

authoritative work on traditions. It was regarded so authoritative that according to Imam Shafi, Mawatta of Malik ranks next to Quran as far as any book after the Quran is concerned. It contains 300 traditions. It is also said that Imam Malik delivered the lecture of Fiqah and Hadith to his pupils from this great book of Tradition. Moreover the problems stated by him is preserved in Al-Muddawwanah al Kubra. This book had been compiled by Imam Sakhnoon. In the beginning, Asad bin Zarat, a Aalim of west, come to Imam Malik and compiled the problems stated by him and gave it the name of Asadia. Later on a pupil of Imam has compiled this book with some changes and named it Al Madwwanna which had got too much repute.

Other writings : Besides Mawwatta, his other notable writings are Risalah Imam Malik, Kitab-ul-Massail Kitab-ul-Manasik, Ahkam ul-Quran etc. etc.

His pupils : His pupils Imam Shafi, Ibn Dinar, Abu Hashim Bin Qasim, Abdullah Bin Wahab Misri are notable.

Q. 9. Write a note on Imam Shafi?

OR

Describe the Contribution made by Imam Shafi towards the compilation of Fiqah?

Ans. IMAM SHAFI : The brief biography and services of the founder of Shafi School of thought is as under.

(1) BRIEF BIOGRAPHY.

(i) Name : His name was Muhammad Ibn Idris Ash Shafi.

(ii) Birth : He was born in Palestine at Gaza in 150 Hijra.

(iii) Education : He memorised the Quran at the age of 7 years and Muwatta of Imam Malik at the age of 13 years. He has got the education of fiqh from Mufti of Makkah, Khalid Bin Zanj who allowed him to give legal opinions when he was only 15 years old. He also learned much from Muhammad Shiabani, the pupil of Imam Abu Hanifa.

(iv) Intelligence : He was very intelligent. He said at the age of 13 that whatever has asked, asked from me. By reason of his this intelligence, he has been allowed to give Fatawas at the age of 15 years. In the recognition of his intelligence Imam Malik says if Shafi

do not born then we remained stand on the door of knowledge and door of fiqh been closed forever.

(v) **Employment** : At the age of 30 he was offered a post by the Governor of Yemen. As a result of some intrigue and subsequent accusation he was deported from Yemen and was sent to Baghdad in the year 184A-H to appear before the Caliph.

(vi) **Writings** : The number of his writings is 113. Famous books are *Kitab-ul-Sunan*, *Risla-tul-Imam*, *Ikhtilaf-ul-Hadith*.

(vii) **Death** : He was died in Egypt in the year 204 A.H. The followers of his school of thought are in Africa, Arab, Mumbay and Madras.

(2) **JURISTIC THOUGHTS AND THEORIES** : The juristic thoughts and theories of the founder of Shafi's school of thought is as under.

(i) **Ilm-ul-Kalam** : Ilm Kalam has no position in the juristic thoughts and theories of Imam Shafi. The reason for this was that he disliked that knowledge too much.

(ii) **Istidlal** : He accepted ratiocination as the last source of Islamic Law.

(iii) **Tradition** : He was not as strict about verification and acceptance of traditions as against the Hanafi School. A basic rule he made was "If the chain of a tradition is complete and sound, it must be followed."

(iv) **Ijma** : He considered Ijma third big source of Islamic Law after Quran and Tradition and he gave wide scope to Ijma than Imam Malik.

(v) **Qiyas** : Like Ijma, he also accepted Qiyas and extensively used it to deduce rules of law.

(vi) **Istehsan and Al-Maslihah** : He neither recognised juristic preference (Istihsan) of Abu Hanifa nor did he agree with Al-Maslihah of Imam Malik.

(3) **JURISTIC SERVICES** : Imam Shafi was a learned personality which the third period of Bani Abbas had produce. He also contributed his share to overall development of Islamic law and jurisprudence. He promoted the idea of studying Fiqah and Traditions from the technical point of view and himself worked

intensively in the same direction. He adopted the middle course between Abu Hanifa and Malik in the use of traditions. He called his school the up holder of traditions. He examined the tradition more critically and he made more use of analogy than Malik. He allowed greater scope to Ijma than Malik, putting a more liberal and workable interpretation on the well known dictum of the Prophet. "My people will never agree on error was the first to write a treaties on usul or principles. Egypt is the strong hold of his doctrines, but his followers are to be found in other parts of Africa, in Arabia, and also some in India, specially in Mumbai and Madras.

Q. 10. Write a note on Imam Ahmad Ibin Hanbal?

Ans. IMAM HANBAL : The brief biography, juristic thoughts and theories and services of the founder of Hanabli school in the codification of fiqh is as follows.

(1) BRIEF BIOGRAPHY

(i) Name : His name was Abdi'llah Ahmad Ibn Hanbal.

(ii) Birth : He was born at Baghdad in 164 A.H.

(iii) Education : He memorised Quran at an early age. He visited Syria, Hijaz, Yemen, Kufah and Basra for the sake of getting knowledge. His teachers in tradition and Fiqah were Imam Shafi. Yazid Bin Haroon, Hafiz Hasheem, Suleman Bin Daud Tiasi, Imam Abu Yusuf and Zafar Bin Hazeel. He was considered more learned in traditions than in the science of law.

(iv) Death : He was died in 241 A.H. at the age of 77. It is said that when he died, 80,000 men and 60,000 women attended his funeral.

(2) JURISTIC THOUGHTS AND THEORIES : The juristic thoughts and theories of the founder of Hanabli School of thoughts are as follows.

(i) In relation to Quran and Hadith : He relied on the Quran and Traditions. He remained contended in looking for solutions of juristic problems from these sources.

(ii) In relation to sayings of Companions : He also gave preference to the sayings of Companions. But where the sayings of Companions were more than one over any issue, there he preferred those which were closest to the Quran and Hadith.

(iii) **Ijma** : He did not give any preference to Ijma. He considered Ijma as confined to Companions.

(iv) **In relation to Zaif and Maruf Hadith** : He accepted a tradition the chain of which is cut up or there is a defect in it. He used that tradition for the establishing of the ahkam in the order of strength. That tradition also is preferred by the Imam over Qiyas.

(v) **In relation to Qiyas** : He accepted Qiyas as a last resort. He exercised it, only at that time when he did not find the solution of any problem from Quran, Sunnah and Ijma.

(vi) **In relation to Ijtihad** : He was averse to exercising Ijtihad.

(3) SERVICES IN THE CODIFICATION OF FIQAH :
He could not play any specific role with reference to the codification of Fiqah. The reason for this was that he relied too much on Traditions. He was, more a traditionist than a jurist. The number of Traditions that he recollected no one even in that age, approached him. In law he adhered rigidly to the traditions, a much larger number of which he felt himself at liberty to act upon any other doctor. His interpretation of them was literal. He was a man of uncompromising nature and as happened with Abu Hanifa and Imam Malik, he incurred the displeasure of the Government of the time and was subjected to ill treatment on account of his being stern and adamant in his views. Although he founded his own school as far as religious and juridical matters were concerned but his school did not gain much prominence. His only authoritative work available to us is Musnad. This is a collection of traditions which consists of six parts containing about forty thousand sayings of the Prophet (p.b.u.h.) His school of thought spread first in Baghdad and then in Egypt. The followers of his school are found in Palestine, Iraq and Syria. The total strength of his followers all over the world is thirty lakh.

CHAPTER 3

SOURCES OF LAW

Q. 11. What are the Sources of Islamic Law?

Ans. SOURCES OF ISLAMIC LAW: The primary sources of Islamic law are Qur'an and Hadith, while *Ijma* Qiyas Ijtihad and Istidlal are the secondary sources; *Istihsan* and *Istihsab* being doctrines of equity and not an independent source. The sources of Islamic Law are as under :

(1) **QURAN** : There is little doubt that the Qur'an is on the whole is the first and most authentic -- of Islamic Law. The Holy Quran given in the many verses the legal system to be adopted, enforced and acted upon by the Muslim. The Quran is an unchangeable source of Islamic Law and so is Universally admitted.

(2) **SUNNAH** : Unfortunately we cannot say the same thing concerning the sunnah because it is a matter of historical record that invention of hadiths were extensively practised, we know that one did not need to resort to falsification to support his claims when there could be found a justification for them in the sunnah of the Companions, since the sunnah of the latter was almost as binding as that of the Prophet. It would not therefore be too rash to assume that certain new elements have found their way into fiqh in the garb of sunnah. In this respect the sunnah of the Companions acquires special importance when we re-call that the spread of Islam throughout Syria, Mesopotamia, Iraq and Egypt was completed in a very short time even before many of the Companions had died, for it means that most of the new situations which Islam faced in its expansion received their solution at the hands of the Companions themselves. Of course this solution as we shall see later in Part III was almost always in the way of sanctioning the existing practices and institutions. In other words by the time the sunnah reached its final and settled form in the famous collections of al-Bukhari, Muslim, and others, many a foreign institution and idea had already found its way into Muhammadan Law either through sanction by the Companions or even otherwise.

The process of absorption from outside and adoption to changing conditions inside by no means stopped after the crystallization of the sunnah into the famous hadith collections, as has just been indicated but went on as before, though this time

through the medium of the remaining sources of legislation such as *ijma* and *qiyas*.

(3) IJMA : *Ijma* may serve to introduce into the law new elements in two ways: (1) so far as its constituent opinions consist in *qiyas*, *ijma* would naturally be as good as *qiyas*. In fact it would be somewhat more effective than *qiyas*, since the evidential force of *ijma* is based mainly on the fact of the consensus rather than on the merits of the individual *qiyas* (2) *Ijma* in many cases would be another form of sanctioning custom. For example if one doctor should express an opinion in approval of a recent custom and the others should keep silent, we would have an *ijma*. Thus we know that the legal institution of *istihsan* was introduced not the law by way of *ijma*.

(4) QIYAS : It is evident that in matters of analogy the question whether or not you are departing from your prototype, depends on whether or not the basis of analogy, namely, the causal attribute (*illah*) is in accordance with the spirit of the prototype. Even if we would disregard the extreme views relative to the determination of this *illah* and confine ourselves to the orthodox views, we would still find it to be true that they offered no adequate guarantee that in applying *qiyas* the revealed texts were not departed from. Take for instance the prohibition of wine-drinking. In order to make a *qiyas* on its basis, in the first place, the cause of the prohibition must be determined. Right here there would be an opportunity for displaying a great deal of scholastic subtlety whereby to determine as cause exactly that attribute of wine-drinking which would best serve the end in view. For instance, supposing that there is in the sources no prohibition against gambling and that we want to bring this under the prohibition it would be easy to do it by considering as the cause of prohibition in the case of wine-drinking a quality of the latter which is also common to gambling for example, excitement. But there is no need to go to even that much trouble, for it is not necessary that gambling should have precisely the quality which was the cause of prohibition in the case of wine-drinking. It is sufficient if gambling has a quality wisely the quality which was the cause of prohibition in the case of wine-drinking. It is sufficient if gambling has a quality wisely the quality which was the cause of prohibition in the case of wine-drinking. It is sufficient if gambling has a quality wisely the quality which was the cause of prohibition in the case of wine-drinking. The mental processes temporarily, or that it was a genus of financial evil, *etc.* Even this does not exhaust the

possibilities, for just as in the case of the causal quality one may take the proximate genus instead of the very same quality, so also in the case of the causal quality one may take the proximate genus instead of the very same quality, so also in the case of the value sought to be applied to the new case, one may apply a value of the same genus instead of the identical value. Thus arguing that prohibition is a genus of restriction one might only restrict gambling instead of entirely prohibiting it, as was the case with wine-drinking. It must be admitted here that the above examples represent somewhat strong cases, yet they are by no means exaggerated. In general one would not have to stretch things so far, for the purpose in hand would be much better served by using a more liberal principle like *istihsan*.

(5) **ISTIHSAN** : Taking it in the sense used by the Hanifites, doubtless is a more effective means than *qiyas* for introducing new elements, since in its case the rules for determining the cause are even subtler than in the case of *qiyas*, and consequently afford greater probabilities. All that is needed is to discern in the new element whose introduction is desired some quality that is shared by a matter already approved or prohibited by the sources and the object is achieved. The principle of *istihsan* made use of by the Malikites is probably the most effective of all, since of dispenses with the necessity of finding for its use of justification in the sources.

(6) **CUSTOMS & USAGES** : Custom as will be recalled, is another important source of legislation since in matters which are not mentioned, in the sources, according to the Hanifites, it is a direct source of law. To a certain extent custom is a source of law even in matters which are mentioned in the sources, moreover custom supersedes the doctor's opinions are largely based on customs.

EFFECT OF CUSTOM AND USAGE ON LEGISLATION IN ISLAM : A custom may be held valid if it conforms to the following requirements:

- (1) A custom must be generally prevalent in the country at large. It must not be a mere local usage. For example in Syria, there is a general custom that at the time of marriage two third (2/3) of the dower is always fixed as prompt dower (*مقبل*) and one third (1/3) is always fixed as deferred dower (*غير مقبل*) which is payable on divorce or death of the husband. The

practice of a few persons will not, however, be recognized. Although in Anglo-Muhammadan Law, as it prevailed in India, a special custom of a tribe had the force of law. The custom of a particular locality cannot acquire the force of law.

- (2) A custom must be continuous. Its occasional practice is not valid. For example, if price is not fixed in a certain bargain, it will be paid according to the currency in vogue in that country. So a custom be shown to have existed and adopted continuously. Any interruption within legal memory defeats it.
- (3) A custom may not necessarily be immemorially old. The custom, therefore, is more flexible than is sometimes supposed. The test of immemorial custom is a mark of modern and not primitive law. Hence it is not the antiquity but general observance which matters.
- (4) Custom is territorial. The custom of one country cannot affect the law of another country.
- (5) Custom has authority only so long as it prevails. So the custom of one age has no force in another age
- (6) Custom must not be opposed to a clear text of the Quran or an authentic Hadith. Sunnis, however, agree that custom is a grade superior to Qiyas.
- (7) A custom prevalent at the time of a transaction will be considered authentic and not that which comes afterwards.
- (8) If one of the parties fixes such a condition which is against custom, then the custom will not be effective because custom is a supplementary condition which disappears in the presence of a clear condition
- (9) Custom is not effective in the presence of (نص شرعي) because the latter is more authentic and reliable than custom. In case a 'nass" is based on general custom (رواج عام) then, in the opinion of Imam Yosuf, custom will be given preference.
- (10) Custom must be reasonable. It should not be repugnant to statutory law or it should not benefit only few at the cost of majority of people.

- (11) A custom must have a peaceful enjoyment.
- (12) A custom must neither be exercised by concealment nor by licence. A secret custom does not exist and a custom based on licence depends on the will of the grantor and has no public observance.

Custom Affected Laws: In the pre-Arab society, old customs were the basis of their civilization. With advent of Islam, the Islamic law was based on Divine revelation and the importance of custom subsided. Custom is not a regular source of law, but it affected Islamic law. In the absence of clear and undoubtful 'Nass' (نص), Imam Malik holds the practice of the people of Madina as *Ijma* and the source of law.

Customs and usages of the people of a country which were not repealed or condemned by Islam were deemed to have been sanctioned by God and the Prophet. Custom comes next to Quran, Sunnah and *Ijma*. Some pre-Islamic customs which were not repealed were sanctioned by the silence of the Holy Prophet.

Custom may claim authority from any Sunnah of Holy Prophet in this manner that he did not object to any custom or usage which the Muslims practised and followed in his presence. It is thus a part of Sunnah.

There is, however, no direct authority to act upon custom and usage (عرف) in the Holy Quran but there is an indirect authority for the recognition of usage. According to Hidayah "As Allah has enjoined that the husband should either retain the wife according to well-recognized custom (امساك بالمعروف) or release her with grace or the Qadi will release on his behalf, 'Urf' is recognized in material behaviour.

Islam did not altogether abrogate the legal system prevalent in pre-Islamic days. Those customs which were not contrary to the Quran and Hadith were retained and the cases were decided in the light of these customs having the force of law. "The fact is, the ground-work of the Muhammadan legal system, like that of other legal systems, is to be found in the customs and usages of the people among whom it grew and developed" (See Abdul Rahim, *The Principles of Muhammadan Jurisprudence*, page 1).

For example, partnership is lawful because the Prophet found practising it and confirmed it. Islam recognized it as a valid wedlock

in which a man asks another person for the hand of his daughter and then marries her by fixing a dower.

Islam generally adopted those customs which did not conflict with any rules of Quran and Hadith. These customs become part and parcel of Islamic Law in the form of *Ijma* or *Istihsan*.

The pre-Islamic customs are helpful in understanding the Islamic law. In fact, some of these customs were revealed by God through His earlier Messengers/Prophets. The customs of () and () were present before Islam. The Arabs were familiar with these terms.

The customs of the present time cannot become Islamic law. They can be Islamicised only. However, Islam has its own independent legal system. It is not indebted to pre-Islamic customs.

Q. 12. Discuss Quran as a source of Islamic Law?

OR

Write a detailed note on Quran as primary source of Islamic Law?

OR

Discuss Holy Quran as a Source of Islamic law?

Ans. (1) DEFINITION OF QURAN : The Quran is the book revealed to the Messenger of Allah, Muhammad (Peace be upon him) as written in masahif and transmitted to us from him through an authentic continuous narration without doubt." (AL. Bazdawi)

(2) REVELATION OF THE QURAN : The Holy Quran was not revealed at once but it took a period of 22 years, 5 months and 14 days.

The first message of Allah delivered by Hazrat Gabriel (AS) to the Prophet (peace be upon him) was the five verses of Surah Al. Alaq in cave Hira. In this Surah Allah says.

"Read in the name of the Lord and Cherisher, who created. Created men out of a (mere) clot of congealed blood.

Read ! and the Lord is most bountiful. He who taught (The use of) the pen---

Thought man that which he knew not"

After that there was an interval or break (fatra), extending over some two and half years. The second revelation came in the form of Surah al-Muddathir (Ayat 2)

In Order of revelation the last Ayat of the Holy Quran is "This day, I have perfected your religion for you, completed My favour upon you and you have chosen, for you Islam as your religion." (Al-Maidah: 3)

(3) ATTRIBUTES OF HOLY QURAN : The attributes of Holy Quran are 55 in numbers. Some of these are:

(i) Al Quran (ii) Al-Furqan (iii) Al-Zikar (iv) Al-Burhan. (v) Al-Noor.

(4) QURAN AS SOURCE OF ISLAMIC LAW : The Holy Quran is the first source of law in point of time no less than in point of importance. It lays down the basic law, and Muslims are enjoined to decide all dispute in accordance with the law as laid therein. We may quote some of these verses of Holy Quran on the point.

(1) "We have sent down to you the Book in truth, so that you may judge between men according to law as laid down by God. (Quran IV. 105)

(2) "Judge between the people by the law sent down by Allah, and do not follow their deserts by turning aside from the truth that has come to you." (Quran V. 51:52).

(3) "Verily Allah has neglected nothing in His Law." (VII.39)

(i) **Ahkam in the Holy Quran :** Ahkam in the Quran has been classified into two main categories.

(i) Hukm Taklifi (ii) Hukm Wadi.

(i) **Hukm Taklifi :** The communication which demands to do or not to do a thing or gives an option between two or more option is called Hukm Taklifi (defining law or law which defines rights and obligations).

(ii) **Hukm Wadi :** The Communication which declares a thing to be the cause or condition, of a rule or an Impediment to it is called Hukm. Wadi. (declaratory law).

(ii) **Kinds of Ahkam in the Quran :** Ahkam in the Holy Quran, are of three kinds.

(i) **Ahkam pertaining to faith** : These are like belief in one God, his Angels, Books, Prophets and the Day of judgment. The discipline dealing with these is that of Tawhid.

(ii) **Ahkam Pertaining to Ethics** : These rules deals with Quranic Ethics. The disciplines that deal with them are ethics and tasawwuf.

(iii) **Ahkam pertaining to practical life** : These are those Ahkam which relates to marriage, divorce, inheritance *etc. etc.* These may be divided into further two forms.

(a) **Ahkam pertaining to Ibbadat** : Ibbadat like prayer, Fast, Hajj and Other Naffli Ibbadat.

(b) **Ahkam pertaining to Muamlat (matters)** : Muammlat like relation of one person with other person, Relation of Individual and Society. Relation of Individual and State *etc.* Ahkam pertaining to Muammlat (matters) may be divided in further six categories.

(i) Ahkam pertaining to Family matters.

(ii) Ahkam pertaining to Civil matters.

(iii) Ahkam pertaining to Penal matters.

(iv) Ahkam pertaining to Judicial matters.

(v) Ahkam pertaining to Constitutional matters.

(vi) Ahkam pertaining to International matters.

(i) **Family matters** : Regarding family matters there have been laid down in Quran some 70 injunctions. In these injunctions, concept of Marriage, Talaq, and Dower is mentioned.

(ii) **Civil matters** : Regarding civil matters there have been laid down in Quran some 70 injunctions. In these injunctions inheritance, sale and purchase, tenancy, contracts, and mortgage have been made the point of discussion.

(iii) **Penal matters** : Regarding Penal matters there have been laid down in Quran some 30 injunctions. In these injunctions punishment for theft, zina, qazaf have been provided.

(iv) **Judicial matters** : Regarding judicial matters, there have been laid down in Quran Some 13 injunctions. In these

injunctions rules as to giving evidence and taking oath have been laid down.

(v) **Constitutional Matters** : Regarding Constitutional matters' there have been laid down in Quran some 25 injunctions. In these injunctions. Relationship of individual and state, rights and liabilities of both individual and state and other Constitutional laws have been discussed.

(vi) **International Matters** : Regarding International matters, there have been laid down in Quran some 25 injunctions which throw light on relation of Islamic State with non-Islamic State, principle of making treaties with other States, and principle of war and peace.

(5) **CONCLUSION** : From above discussion, we can derive this result that Quran is not only the first source of Islamic laws but it is the most comprehensive source. In it all injunctions regarding human life have been stated. This is so clear and comprehensive that today if we make a recourse to Quran in case of any difficulty or difference we will not be desparated as it is that book there was neither existed any book before it and nor there is any book in the present which can compete with this book and on this source of Islamic Law all Ulemma are agreed upon it.

Q. 13. Write a detailed note on the Compilation of the "Holy Quran"?

Ans. (1) INTRODUCTION : Quran is the name given to the collection of revelations made to the Prophet Muhammad (peace be upon him) when he was assigned the prophetic career and appointed Messenger of God; it is the very word of God. It consists of verses which were revealed to the Prophet bit by bit. The best proof that it is the word of god is the verse of Quran itself, which explains. "Verily this Holy Book has been sent down by the Almighty." Since the Quran contains the commands of the almighty, it is an ordinance, law and legislature for us. There is another Quranic verse which explains that the Messenger of God does not say anything of his own but he is inspired by us.

It is the basis of legal knowledge. Its provisions constitute a perspicuous declaration (Qr. iii. 132) in all matters spiritual and temporal, which men are under obligation to observe. It is also an exhaustive code of Divine Orders, and guides those who believe in the unseen, the Almighty.

(2) LITERAL MEANING OF QURAN : The literal meaning of the word Quran is that which read, since in the first revelation the prophet was ordained to read. It became Quran and thus the totality of verses so read are termed as Quran.

Definition of Quran : According to Al-Bazdawi "The Quran is the book revealed to the Messenger of Allah, Muhammad (Peace be upon him) as written in the masahif and transmitted to us from him through an authentic continuous narration without doubt."

(3) COMPILATION OF THE HOLY QURAN : The compilation of Quran has a detailed and well documented history. These detail can be studied under the following heads.

- (i) Compilation of Quran during the period of Holy Prophet.
- (ii) Compilation of Quran during the period of Hazrat Abu Bakar.
- (iii) Compilation of Quran during the period of Hazrat Uthman.

(i) Compilation during the period of Holy Prophet (P.B.U.H.) : It is proved by Ijma and Twater that the Quran was compiled under the Orders of God. The Holy Prophet was guided by the Angel Gabriel in this respect.

Writing of the Revelation : The Holy Prophet had appointed expert Stenos. When any incomplete and separate surah was revealed, the Holy Prophet used to send for some of his Stenos and dictate to write a particular verse in a particular surah in the context of particular verses.

"The Prophet (peace be upon him) says, "The Gabriel came and asked to place this verse in this place of this surah."

Number of Stenos : According to one report, the famous stenos of Revelation were twenty six but the second version is that there number was forty two. The most illustrious among them are--

- (i) Hazrat Abu Bakar, (ii) Hazrat Umar Farooq (iii) Hazrat Uthman (iv) Hazrat Ali (v) Amir Bin Faheera. (vi) Abi Bin Kab (vii) Zaid Bin Saabit (viii) Yazeed Ibn-e-Abi-Safian.

Number of Memorizers : The renowned memorizers were (i) Abu-zaid (ii) Zaid Bin Saabit (iii) Abi-bin Kaab (iv) Maaz bin Jabal (v) Abdullah bin Masood.

Preservation of the written part of Revelation : The written part of the revelation was preserved in the Prophet's house while some of the Stenos would record the verse for themselves and preserves them for their own use.

Writing and Memorization of the Holy Quran : The Companions of the Holy Prophet used to write and memorise the Holy Quran by Heart. During these days, paper was rare. Some Companions wrote it on paper but usually it was written on palm leaves, epitaph of stones, broad shoulder bones of the camels and pieces of skin. As it was difficult to consolidate such a scattered material, so the Quran was not in a single volume at that time. During the life time of the Prophet no need was felt for it. The Quran was present in the minds of memorizers with correct arrangement. For its security the Quran assures that:

"We are responsible for its compilation."

Proof of compilation during Prophet. (P.B.U.H.)
Period : The Holy Quran, which is the only book of Divine origin, was present in its written form during the life time of Holy Prophet (P.B.U.H.). The Quran itself Indicates this fact.

(1) "Only the clean should touch it". (Q. 56:79)

The possibility of touching arises if it is in the written form. Further God says.

(2) "And you have not written it (The Quran) with your right hand. (Q. 29:48)

So it is clear from above discussion that the whole of the Quran was present in the written form during the life time of Holy Prophet (P.B.U.H.).

(ii) Compilation during the period of Hazart Abubakar : In the battle of Yamamah nearly seventy memorizers (Hufaaz-e-Karam) sacrificed their lives. So on the advice of Umar, Abu Bakar, the first Caliph, Ordered the collection and compilation of the Quran. Zaid bin Thabit, a companion, Steno of revelation, jurist and memorizer was appointed by the Caliph to collect the Holy Quran. He compiled a volume very carefully. Its copies were

prepared. One copy was retained by Abu Bakar. After his death it was in the custody of Umar, the second Caliph. After his death it was entrusted to his daughter.

The manuscript prepared during the period of Abu Bakar was called Mushaf.

(iii) Compilation during the period of Uthman : There were several tribes having different dialects in Arabia. Sometime the same word was used in different intention and spelling, *e.g.* as and as. In some of the tribes the sign of plural was indicated by Instead of . There was seven famous Qarat in Arabia. Again, till the reign of the third caliph the Muslims had conquered several countries and various non Arab Nations came under the banner of Islam. Once Hudhaifah a companion, went for Holy war on the northern frontier of Iraq and Iran. He saw a dispute over Qarat among the people there. In order to rectify this imperfection, Uthman assembled the Umma on a single Qarat of Quraish making use of the doctrine of Ijma.

Uthman got the volume of Abu Bakar from Hazrat Hifsa and ordered Zaid Bin Thabit, assisted by eleven members, to prepare its copies in the Qarat of Quraish which was enact intonation and pronunciation of the Holy Prophet. Then he sent one copy each to every province. Uthman is called Jama-ul-Quran in this respect that he assembled the whole ummah on a single Qarat of Quraish, otherwise the collection of the Holy Quran was completed during the regime of Abu Bakar who was in fact the first Jama-ul-Quran. Since there has been no alteration. There is, says William Mair, "Probably no other work in the world which has remained twelve centuries with so pure a text."

Order of arrangement of the Holy Quran : The order of arrangement of Holy Quran, is according to the plan laid down by God and not according to the free will of the Holy Prophet or any body else. The place of every ayah and sura in the Holy Quran was told to the Prophet by the Angel Gaberiel. This arrangement of the Holy Quran is not according to time sequence in revelation but is according to subject.

Diacritical Marks : At first there were no diacritical mark on the words of the Quran. They were applied after 50H. In the beginning they were in the form of dots. This duty was performed by Abu-al-Aswad Aldaili, the disciple of Ali and his pupils. The final

shape to Diacritical Mark was given by Khalil Bin Ahmad, a renowned grammarian.

Q. 14. Discuss the importance of Quran as primary source of Islamic Law?

Ans. IMPORTANCE OF QURAN AS A SOURCE OF ISLAMIC LAW : The Holy Quran is the foremost and big source of Islamic Law. Its importance as a source of Islamic Law is too much. Because it is such a fountain head of Islamic Law against which there existed no other source of Shariah. All the rules and regulations of Islam are regulated under it and they have been also derived from it. There has been no such problem in Islamic Shariah for the solution of which, approach has not been made to Quran.

In Islamic Law it has been given so much importance as a source due to its following qualities.

(i) **Revealed Book :** This is a revealed book and contained directions and laws revealed by God. God has revealed so many books and Saheefe on his Prophets and messengers but they all have been repealed after the revelation of Quran. Now according to God only Islam is admissible as religion and law as well. No other religion will be accepted other than this.

(ii) **Order of God :** Allah has ordered to make Quran as source of law. God says:-

"So (Prophet p.b.u.h.) judge among them by what Allah has revealed (Al. Maidah: 48)

The Holy Prophet (p.b.u.h.) had also take guidance in each and every matter from Quran.

Example : When Holy Prophet (p.b.u.h.) has appointed Mauz as a governor of Yemen, he asked Mauz, how will you decide the matters of people then his answer was that he will take guidance from Quran.

(iii) **Complete code of life :** The Holy Quran is a complete code of life covering each and every aspect and phase of human life. This book of Allah lays down the best of rules relating to social life, commerce and economics, marriage and inheritance, penal laws and international conduct.

(iv) **Fountain head of knowledges :** The Holy Quran is a fountain head of all the knowledges and fine arts of the world. In it

we found so many, essays on spiritual, social, scientific and linguistic knowledges, which are of great importance for guidance of men in different things.

In spiritual knowledges, we find the knowledge of oneness of Allah, attribution of Allah, knowledge of Angel, knowledge of Prophets, knowledge of hereafter *etc. etc.*

In social knowledge, knowledge of politics, economics, History and manazra (challenges) are notable.

In scientific knowledges, knowledge of Chemistry, Physics, Botany, Zoology are included.

In linguistic knowledges, knowledge of Sarf-e-Nav, Maani, Biaan *etc.* are included.

(v) Unique Book : The Holy Quran is a unique Book. There is no other book like this book. The claim of Quran in this respect is that if Jin-o-Ins are assembled and make try then it is very difficult for them to do this. In Sura-Al-Baqra Allah has given the open challenge to the world that if you are in doubt concerning that which we have sent down. (i.e. the Quran), then produce a Surah (chapter) of the like thereof."

(vi) Beyond from doubt and uncertainty : The verses and injunctions of Quran are beyond from any doubt and uncertainty. God says:-

"This is the book (the Quran) whereof there is no doubt" (Al Baqra: 2).

Whereas the man made laws are not pure from mistakes, and uncertainties. The Quranic law giver has the knowledge of every thing. Each and every word revealed by him is full of knowledge and surety.

(vii) Beyond from limitations of region; race; and society : The Quranic laws are not for any specific period, region, race or society, but they are for every period, race, region and society. Universal directions cannot be restrained in a specific Angle. This is a book of guidance till the day of judgment.

(viii) Offer a solution of problems : The Holy Quran offers a solution of the most be wildering problems of man's life on this earth such as the distribution of wealth; the relationship between individual and society; the question of man's true status

and station in life, the balanced relation between man and woman; whether man's freedom is unbridled or he is accountable and unanswerable for his deeds and all such questions on which depend in any degree the happiness and advancement of man and about which the human intellect cannot present a balanced and satisfactory solution; and which have been a major rather the only source of human misery and suffering throughout the long history of mankind.

(ix) **Swept away superstitions:** The Holy Quran swept away all superstitions and the followers of Islam became lover of knowledge, drinking deep at every fountain of learning. This was because the sacred book appealed to reason and declared man's thirst for knowledge to be insatiable.

(x) **Duties with regard to Allah :** The Holy Quran also points out what the duties of man are with regard to Allah, to his fellow beings and to his ownself. It lays stress on the fact that man has been created to fulfil the wishes of his creator and lead his individual and collective life in accordance with the instructions contained in the Holy Book and as taught by the Holy Prophet (p.b.u.h.).

Q. 15. Write a short note on the leading commentaries of the Holy Qur'an?

Ans. COMMENTARIES OF THE HOLY QUR'AN : The study of the Qur'an, the primary source of all laws, also occupied some of the best talents among the Muslims and the Science of its interpretation (*tafsir*) was naturally regraded as of the highest importance. Following are the leading Commentaries, on the Holy Qur'an :

(1) **Tibri's Commentary upon Holy Qur'an :** It was written by famous erudite scholar Abu Jafar Muhammad bin Jareer Tibri who committed the Holy Qur'an to his memory when he was yet seven years old. His book summarises all the writings upon Qur'an upto that time. He wanted to write it upon 30,000 pages but then reduced it to 6,000 pages upon his students' request. After 400 years it was further summarized by Ibn Kaseer and he took the *rawayat* which he thought correct.

Tibri has collected all *rawayat* with traditions under each *ayat*. There are weak traditions in his book. All the branches of knowledge about language and expressed are there. There are many discussions having philological and grammatical interest. There are

many verses quoted there. He mentions disputed problems and give different points of view. His book is an encyclopaedia of Islamic knowledge.

(2) **Zamakhshari's kashshaf**: Zamakhshari was a master of grammar, literature and philology and had very wide reading. He collected all his knowledge in this book. He was a *Mutzaalite* but his book is still alive because of its literary and other merits. He also quotes verses of *ayyami-i-jihalat*.

(3) **Razi's mufatih-ul-ghain or tafsir-i-kabir**: Razi has collected all the knowledge, traditional as well as philosophical in this book and requires a person to become an erudite before being able to get at his purpose by reading this book. Otherwise a person simply gets confuse. A full volume is devoted to *Sura Fateha*. Some people say that there is everything in it except commentary upon Holy Quran. Razi died after writing 7/8 parts of this book and the rest was written by another scholar.

(4) **Baizawi**: Abdullah bin Umar Baizawi took all the philosophical excesses and the *Mutzaalite* thinking out of "*Kashshaf*" and added many meritorious things found in other commentaries. It is very concise and simple. It is a comprehensive book upon language, grammar and *qiraat*. He has tried to excel Zamakhshari in this field.

(5) **Ibn-i-Kasir** made Tibri's commentary concise and took only authentic traditions.

JALALAIN: It was started by Jalal-ud-Din Mahli and completed by his pupil Jalal-ud-Din Sewti, after the former's death. Both the writers bore the name of Jalal-ud-Din so this book is called *Jalalain*. It is a very concise book in vogue in the religious schools in our country.

Q. 16. Write a short note on Theory of abrogation?

OR

Discuss the theory of abrogation in Quran in detail?

OR

Elaborate the theory of abrogation in Quran.

Ans. (1) MEANINGS OF ABROGATION OR NASKH:

(i) **Literal meanings**: Literally naskh means annulment or cancelation.

(ii) **Legal meaning** : Legally it means repeal of a legal provision by another legal provision.

(2) THEORY OF ABROGATION (NASKH) : The concept of repeal and overriding laws is a necessity in a legal system. Interests may keep on shifting with a change in circumstances and the law adjust accordingly. The law was laid down in the period of Prophet (P.B.U.H.) gradually and in stages. The aim was to bring a society steeped in immorality to observe the highest standards of morality. This could not be done abruptly. It was done in stages and doing so necessitated repeal and abrogation of certain laws.

Theory of Abrogation (naskh) in the eye of Holy Quran : Quran Says :

- (i) "Whatever a verse (revelation) do we abrogate or cause to be forgotten, we bring a better one or similar to it" (2:106)
- (ii) And when we put a revelation in a place of another revelation" (10:101).

(3) CLASSICAL THEORY OF ABROGATION (NASKH) : In classical fiqh, however when we used Naskh in the context of Quran, it conveys three fold meanings.

- (1) Quran abrogated the earlier Divine Scriptures like the Old and New testaments.
- (2) Repeal of some Quranic verses whose text are blotted out of existence. Such textually repealed verses are further sub divided into two types.
 - (i) Those verses whose text and law are both repealed.
 - (ii) Those whose text only is believed to be repealed but law remained in force.
- (3) It devotes the abrogation of some earlier commandments of Quran by later revelation while the text containing those earlier commandments remained embodied in the Quran.

(4) TYPES OF ABROGATION : Abrogation is of two types--

- (i) Explicit, and
- (ii) Implied.

(i) **Explicit Abrogation** : Explicit Abrogation takes place when the law giver has explicitly stated that rule is abrogated. For example the Prophet (Peace be upon him) said I used to forbid you from visiting graves but you do so now.

(ii) **Implied Abrogation** : Implied abrogation takes place when the law giver has not expressly pointed out the abrogation, but has laid down a new rule that conflicts with an earlier rule and there is no chance of reconciling the two provisions.

EXAMPLE : An example is the period of Iddat for a woman after the death of her husband.

Verse 240 of Al-Baqrah provides as under.

"Those of you who die and leaves widows, should bequeath for their widow a year's maintenance without expulsion". [Quran 2:240]

This verse implies that a woman whose husband has died has to wait for a whole year. This was the rule in the early days of Islam till the following verse was revealed.

"If any of you dies and leaves widows behind; they shall wait concerning themselves four months and ten days". (Quran 2:234)

This verse indicates that the waiting period is four months and ten days. This verse, therefore, acts as an abrogating verse for the earlier rule because it was revealed later. [Types of Abrogation: Source: Islamic Jurisprudence by Imran Ahsan Khan Nayazee]

(5) **CONDITIONS FOR ABROGATION** : The conditions for Abrogation, according to jurists, are the following:

- (i) The abrogating and abrogated text must have existed during period of revelation.
- (ii) The abrogating text must be separate and later in time from abrogated text.
- (iii) Abrogating and abrogated text must be of some legal strength.
- (iv) Abrogating and abrogated text must be revealed. They must form part of the revealed laws.

- (v) Abrogating and abrogated text must be in conflict with each other (As one text is said to repealed by another when the two are said to be conflicting with each other).

(6) FORMS OF ABROGATION : Abrogation, according to the Hanafis and most of the Shafi, and Maliki jurists may be--

- (1) of one Quranic text by another
- (2) of one traditionary text by another.
- (3) of a Quranic text by a traditionary text; and
- (4) of a traditionary text by a Quranic text.

There are some Shafi is and Malikis who agree so far (1), (2) and (4) are concerned, but not so as to (3) that is to say, they do not admit that a Quranic text can be repealed by a traditionary text.

(7) INSTANCES OF ABROGATION FROM QURAN AND HADITH.

(i) FROM QURAN : There are several instances which show that one Quranic text can be repealed by another. Here only one instance is given for the guidance of students.

In Suratul Baqara it is laid down that one should make provision by will for his parents and other relatives, but so far as it sanctions bequest in favour of a man's heir. The verse in question has been abrogated by implication by a verse in Surah Nisa by which the parents and certain other near relatives of deceased person are allotted certain shares in the inheritance as heirs.

(ii) FROM HADITH : There are also many instances of repeal of one traditionary text by another, for example the Prophet in one of his earlier precepts condemned the practice of visiting the graves, but after wards permitted it by another precept.

"I have forbidden you from visiting the graves any visit them for they remind you of the day of resurrection."

(8) LIMITATIONS ON ABROGATION : There are some limitations on the theory of abrogation, which are as under---

- (i) All those Acts, which Prophet has forbidden according to Quran, cannot be repealed. *i.e.* Kufar-o-Shirak or Hillat-o-Hurmat.
- (ii) All those Acts which are related to beliefs, cannot be abrogated. *i.e.* Faith on God, Tawhid, Prophethood, Quran-e-Majeed.
- (iii) After the death of Holy Prophet Islamic Shariah in its entirety cannot be repealed.

Q. 17. Discuss Sunnah as a Source of Islamic law. What are its kinds?

Ans. (1) MEANINGS OF SUNNAH:

(i) **Literal Meanings :** Sunnah is an Arabic word. Which literally means a path or the way, a manner of life.

(ii) **Technical Meanings :** Technically it means, "What was transmitted from the Messenger of Allah (P.B.U.H.) of his words, acts and (tacit) Approvals."

(2) KINDS OF SUNNAH :

- (i) According to its Nature.
- (ii) According to its Authenticity.
- (iii) According to its modes of Narration.

(i) **According to its nature :** According to its nature, Sunnah is of following kinds.

(a) **Sunnah Qawli :** It is defined as the sayings of the Prophet (P.B.U.H.) through which he intended the laying down of the law or the explanation of the Ahkam.

EXAMPLE : "Innamal Aamalo Binniyyat"

(The nature of acts is dependent upon the underlying intention).

(b) **Sunnah Faili :** It is defined as the acts of the Prophet (P.B.U.H.) having a legal content like his prayer, fasts, Hajj. These

acts or the method of their performance that he adopted are to be followed in the sameway as his sayings.

(c) **Sunnah Taqriri** : It is defined as the commission of certain acts, by words or deed, by some companions and the maintenance of Silence by the Prophet (p.b.u.h.) without expressing disapprovals. His silence in such a case is called Taqrir.

(ii) **According to its authenticity** : According to its authenticity, Sunnah is of also of three kinds.

(a) **Continuous** : It means those traditions which were narrated by numerous Companions and good number of Followers and then their Followers, were known as continuous due to concurrence of narration. Such traditions are considered the most reliable and are acceptable for purposes of legal matters. These are also called Hadith-e-Mutwatter.

(b) **Famous** : These are traditions which have been narrated by a good many of the Followers and their Followers but comparatively a few Companions have narrated them. They are known as famous, Hadith-e-Mashhor. They rank next to continuous and acceptable as an additional source.

(c) **Isolated** : These traditions are those which have been narrated during the period of Followers of the Companions by numerous persons. In the first two periods, there are only one or two narrators, Hanafi accept such tradition as an additional source. These are also called Ahad or khabre-wahad.

(iii) **According to the Modes of Narration** : According to the modes of narration, these are again of two kinds.

(a) **Connected** : Those traditions which have complete chain of narration, having right up to the Holy Prophet (P.B.U.H.) himself. In other word there must be a chain of continuity in its narration and there should be no break in Between.

EXAMPLE : If D is narrating in later period he would quote C's name for it and C would quote B and B hear it from A and thus A to D a continued chain of narrators. This is called Hadith-e-Mutsil or Ghair Mursal.

(b) **Discontinued** : Such Tradition in which one or more of the links in the chain of narrators is missing, it is called Hadith Ghair Mutasil or Ghair Mursel. If such a tradition is narrated by the Companions of the Holy Prophet (P.B.U.H.) it is accepted.

(3) **SUNNAH AS A SOURCE OF ISLAMIC LAW** : Sunnah is the second primary source of Islamic law. It is that source of Islamic Law without which Holy Quran can not be understood at all. In the words of the Quran, the relationship of the Quran and the Sunnah is that of book and the light.

Quran says in Surah Almaida verse No 15.

"And came to you from God, the light (Prophet) and the book."

(I) **Justification of Sunnah as a Source of Law.**

(i) **From Holy Quran** : There are lot of verses in the Holy Quran which justify Sunnah as a source of Islamic Law. Some of these verses are.

(1) "O ye who believe! Obey Allah and Obey the Messenger and those charged with authority among you. If ye differ in anything among yourselves, refer to it Allah and his Messenger if Ye do believe in Allah and the last day." (Quran 4:59)

(2) "He who Obeys the Prophet (Peace be upon him), Obeys Allah". (4: 80)

(3) "So take what the Messenger assigns to you and deny yourselves that which he with holds from you". (Surah Hashar : 7)

(4) "For you the life of Prophet has got model of behaviour" (Al Ahzaab 20)

(ii) **From Prophethood of Muhammad (p.b.u.h.)** : The Prophet (P.B.U.H.) declared:

"Behold I have been given the Book and a similar thing (Sunnah) along with that."

(iii) **Scope of Sunnah as a source of law** : The scope of Sunnah as a source of law, may be elaborated in the following points.

Unelaborated means those Ahkam of Holy Quran which have been stated in one or more sentences. These Ahkam do not provide full detail to the reader about any problem and his mind awaits for further detail. The Sunnah provides the reader the same detail.

EXAMPLE : Quran order for saying prayer but does not provide the timings of prayers, number of prayers and their rakas as well. It is the sunnah of the Holy Prophet which provides the timings of prayer, number of prayers as well as of their rakas.

(ii) **To make absolute declarations qualified :** Those Ahkam which are called absolute Sunnah makes them qualify.

EXAMPLE : The Quran says that the hands of the male thief as well as the female thief are to be cut.

The Prophet (p.b.u.h.) qualified this injunction with the condition like the convict should not be lunatic, should not be a child, if he achieved the punishment should not be inflicted in the cases of trifles, if the punishment should be suspended during war and stealing of food is not punishable.

(iii) **To make the general 'Ahkam' Specific :** The meanings of the Quran is General, the Sunnah makes it specific and particular.

The Quran says.

And his parents each receive one sixth of what he has left, if he has children, but if he has no children and his heirs are his parents, then his mother receives a sixth." (IV:12)

And half of what your wives leave belongs to you if they have no children but if they have children, a fourth of what they leave belongs of you." (IV 13)

Thus God made it plain that father and wives are among those. He named in various circumstances the terms are general. But the Sunnah indicated that it is intended to mean only some fathers and wives, excluding others, provided that the religion of

father, children and wives is the same (i.e. Islam) and that each heir is neither a killer nor a slave.

(iv) **To make implicit Akham explicit :** The Quranic injunction is sometimes implicit and the Sunnah makes it explicit by providing essential ingredients and its details.

All women are prohibited to men except in one of the two ways. Nikah or wati (intercourse with a Slave) by virtue of possession. These are the two ways made lawful by the Quran. But the Quran is silent about how to solemnise a valid marriage. The Prophet laid down in the Sunnah the modes in which the Nikah makes a previously forbidden woman lawful. Such as the need for a guardian, the testimony of witnesses, the consent of the spouses and the dower.

(v) **To add and supplement the legal provisions of Quran :** The Sunnah may add and supplement the legal provisions of the Quran. The Quran prohibits the marriage of two sisters to one man and then says that what is besides this is permitted. The cases of a woman along with her maternal or paternal and aunt also similar because of common underlying cause. The Sunnah therefore, prohibits such marriage also.

(vi) **To make certain exceptions :** The Sunnah makes certain exceptions to the general rules made by the Quran.

The Quran made a general declaration that one may bequeath his property by will in the manner he likes. The Sunnah has created the exception in the rule that one cannot make will in favour of one legal heirs.

Q. 18. Define and explain the importance of Sunnah as a source of Islamic Law?

Ans. (1) LITERAL MEANINGS OF SUNNAH : Sunnah literally means well known path or the well trodden path.

(2) DEFINITION OF SUNNAH : "What was transmitted from the messenger of Allah (p.b.u.h.) of his words, acts, and tacit (approvals)."

(3) IMPORTANCE OF SUNNAH AS A SOURCE OF LAW : Sunnah is a great source of Islamic Law and it has gained so much importance due to having following qualities.

(i) Hidden revelation : This thing is been proved from Quran, that other than Quranic verses, Revelation was also revealed on Prophet (p.b.u.h.). This revelation has been said Hidden revelation (Wahi khafi) in the terminology of the learned people.

Quran says :-

"Nor does he speak of his (own desire). It is only a revelation". (Al-Najam 3' 4).

(ii) Order of God : God has admired the sayings, deeds, and conduct of Prophet (p.b.u.h.) and ordered the people to obey the Prophet (p.b.u.h.).

There are several verses in the Holy Quran in which the obedience of Prophet (p.b.u.h.) is ordained. This obedience is not for the time being but for all the time to comes. A few verses may be quoted thus:-

(1) "For you the life of Prophet has got the model of behaviour". (Al-Ahzab; 20).

(2) "O you who believe! Obey Allah and Obey the Messenger (Prophet) (p.b.u.h.)". (Q. 4:59)

(3) "He who obeys the messenger, obeys Allah (Subhannah wata'ala)."

(iii) Order of Prophet (p.b.u.h.) : Prophet (p.b.u.h.) has also declared obligatory to obey his Sunnah. This is also a quality which explains the importance of Sunnah as a source of Law.

Prophet (p.b.u.h.) said:-

(1) "Verily, I have left amongst you the book of Allah and Sunnah of his Apostle which if you hold fast, you shall never go astray."

(2) "Behold! I have been given the Book and similar thing (Sunnah) alongwith that"

In the above said Hadith "similar thing means Sunnah of the Holy Prophet (p.b.u.h.).

(iv) Essential for understanding Quran : It is not difficult but also impossible to understand Quran without Sunnah. For instance, in Quran order of offering prayer has been given but method of offering prayer has not been mentioned. The Sunnah of Holy Prophet (p.b.u.h.) teaches us this method. The same matter is also with Zakat and Hajj.

By this it is known to us that Sunnah explains the Holy Quran.

(v) Source of Ittehad-e-Ummah : If God does not make the Commentary of Holy Quran through Sunnah then it is difficult for every muslim to understand it according to his own wisdom. For instance, if it is only to decide according to Quran whether prayer of Friday is Faraz, or Wajib, Sunnah or Mustahib, etc., then without Sunnah of Holy Prophet (p.b.u.h.), the way and manner of thinking of each person in this matter will be quite different from another and this different way of thinking may cause hurdle in the unity of Ummah. So we can say that Sunnah of the Holy Prophet (p.b.u.h.) is great phenomena of the unity of Ummah.

(vi) Basic source of Islamic Laws : There are four sources of Islamic Laws i.e., Quran, Sunnah, Ijma and Qiyas.

After Quran, it is the Sunnah of the Prophet (p.b.u.h.) which has got the status that it form the Islamic Laws and define the Haddood. The Solution of so many legal problems is been found from the practical life of Holy Prophet (p.b.u.h.) which are also preserved in your (p.b.u.h.) Sunnah. Moreover explanation of the injunctions of Quran is also made from Sunnah. For this reason the place of Sunnah is very important in the making of Islamic Laws. There is an order existed in Quran to cut the hand of thief but there is no order in Quran that from where the hand of thief should be cut off. The answer of this question is found in Sunnah. By reason of this characteristics Sunnah of the Holy Prophet has given great importance in Islamic Fiqah.

By reading these above said characteristics, which have been stated with reference to Sunnah, no one can deny from the importance of Sunnah as a source neither he can say that it is an ordinary source of Islamic Fiqah but he shall say this that after Quran it is only the Sunnah which among other sources is of great importance in Islamic Fiqh.

Q. 19. What is the difference between Qur'an & Traditions ?

Ans. DIFFERENCE BETWEEN QUR'AN AND TRADITIONS : As every one knows the Qur'an is the Word of God, it is divine order, the dictates of the Almighty; whereas the Traditions are the words of the Holy Prophet. As the Holy Prophet was human being, the Traditions are the word of human beings and the Qur'an is the word of God. This is one view. Both are equally important sources of Islamic Law and according to some jurists both are equal in all respects in the sense that the precepts of Holy Prophet are in explanation to the Qur'an and he did not say anything unless he was inspired by God, and in this respect Qur'an and Traditions gave common element of divinity. That is why some jurists, while discussing the sources of Islamic Law, have bracketed the Qur'an and Traditions together. They have categorised both as a primary source of Islamic Law. However, for our purposes we have to treat both as a separate source and highlight the characteristics of this most important source of law which ranks next to the Qur'an.

Q. 20. Discuss the difference between Sunnah and Hadith?

Ans. SUNNAH AND HADITH :

(1) **SUNNAH :** Sunnah in the literal sense means a path or the way, a manner of life.

In the language of Muslim jurists it means and signifies the practices of Holy Prophet (Peace be upon him). According to some Sunnah includes also the practice of the four Caliphs and other Companions.

(2) **HADITH :** The word Hadith is derived from the word Tahids which means primarily a communication or narrative

whether religious or profane . Then it was the particular meaning of a record of actions or saying of the Holy Prophet (Peace be upon him) and his companions. In the latter sense the whole body of the sacred Tradition of Muhammadan is called Hadith.

(3) DISTINCTION BETWEEN SUNNAH AND HADITH : Generally people believe that the terms of Hadith and Sunnah cannot the same meaning, they regard generally the precepts of the Holy Prophet as Hadith or Sunnah. This concept is not altogether correct. There are few points of difference between Sunnah and Hadith which are as follows.

SUNNAH

- (i) Sunnah literally means a path or the way, a manner of life.
- (ii) Sunnah legally means practices of the Holy Prophet (Peace be upon him).
- (iii) Sunnah is bigger thing (word) which has three element.
- (iv) It is obligatory upon Muslim to act on Sunnah.
- (v) Sunnah was never compiled and it is out of compilation.

HADITH

- Hadith literally means a verbal communication or a narrative.
- Hadith legally means record of actions or sayings of Holy Prophet (Peace be upon him).
- Hadith is one element of Sunnah.
- It is not obligatory upon Muslim to act on Hadith, as a Hadith by its authenticity may be fabricated, weak or wrong.
- Hadith was compiled and its compilation is existed in proper form.

Q. 21. Define "Ijma and describe its kinds and conditions for a valid 'Ijma'?"

OR

Define 'Ijma' what are its kinds and how is it conducted?

Ans. (1) INTRODUCTION : Ijma means determination and consensus or the collection of several things or way of believers.

The society which was established by the Holy Quran and the Sunnah has not died away. It is a living society and spread all over the world. Its universal practices, the beliefs and the actions unanimously recognised by the Muslims, are the carriers of those few missing links. For this reason Allah Almighty gave sanction to the consensus of the Muslim.

(2) MEANINGS OF IJMA : The word ijma, which is a derivative of the word jama, literally used in two senses.

- (i) The first is determination and resolution.
- (ii) The second way in which the word is used is agreement upon a matter.

(3) DEFINITION OF IJMA : "Ijma is defined as the unanimity of jurists and pious persons of any period in any matter of opinion or action."

(4) AUTHORITY OF IJMA BY QURAN AND HADITH.

(i) Authority by Quran : There are several verses of Holy Quran which put the seal of authenticity to this institution. Verses of Quran about Ijma are quoted below."

- (i) "You are the best of men, and it is your duty to order men to do what is right and to forbid them from practising what is wrong."
- (ii) "If you yourself do not know, then question those who do."
- (iii) "Obey God and Obey the Prophet and those amongst you who have authority."

(ii) Authority by Hadith : There are several sayings of the Prophet, which put the seal of authenticity to this institution. The Prophet both by word and deed encouraged the general concept of Ijma. The Traditions of the Prophet about the Ijma are quoted below.

- (i) "My people will never agree on erroneous things".

- (ii) "It is incumbent upon you to follow the most numerous body."
- (iii) "What Muslims agree to be good is also good in the eye of God."

(5) **KINDS OF IJMA** : Ijma is of following two kinds.

(i) Ijma-e-Sanadi (ii) Ijma-e-Mazhab.

(i) **Ijma-e-Sanadi** : It is the consensus of the learned people only. It is the consensus not of all the Muslims but only of those Muslims who are well versed in Islamic law and religion. Thus such an consensus assumed more sanctity in due course.

Kinds of Ijma-e-Sanadi : Ijma-e-Sanadi has the following kinds:

(i) Ijma-e-Sahaba- Bisrahat (ii) Ijma-e-Sahaba-Bisskoot (iii) Ijma Tabaieen (iv) Ijma Mutakhreen.

(ii) **Ijma-e-Mazhabbi** : It is that type of Ijma in which some jurists express their opinion on any matter. This consensus may be in two ways:

- (a) by words where the consensus is established by spoken words;
- (b) by deeds, where consensus is established by unanimous practice.

An ijma belongs to this class if it be in strict conformity with the requirements of law and proved by infallible testimony.

Kinds of Ijma-e-Mazhabbi : Ijma-e-Mazhabbi is of following kinds.

(i) Ijma-e-Murkkab (ii) Ijma-e-Ghair Murrakkab.

(6) **WHO CAN PERFORM IJMA** : (i) Scholar of Quran and Sunnah.

- (ii) Knowledge of Qiyas.
- (iii) Expert of Arabic language.
- (iv) Impartial thinking.

(v) Well versed with upto date knowledge.

(7) CONDITIONS FOR VALID IJMA : The Conditions for valid ijma are the following.

(i) **Ijma among Mujtahids :** The Consensus of opinion must be arrived at among those who have attained the status of Ijtihad. Thus, an agreement between those who have not attained this status will not form a valid ijma.

(ii) **Unanimous agreement :** The consensus among the Mujtahids must be a unanimous one, otherwise a valid Ijma will not be formed. So it is necessary that the agreement or consensus must be unanimous among all mujtahids or jurists.

(iii) **Jurists must be from Ummah Muhammadi (P.B.U.H.):** The third condition which is necessary for the constitution of valid ijma is that the jurists who are participating in it must be from the Ummah of Hazrat Muhammad (P.B.U.H.). Thus an agreement among the jurists who are not from Ummah Muhammadi will not be considered as Ijma.

(iv) **Agreement--After the death of Holy Prophet (P.B.U.H.) :** The consensus must have taken place after the death of Holy Prophet (P.B.U.H.).

(v) **Single Determined period :** The consensus must be among the mujtahids of single determined period.

That means to say, it must be among the Mujtahids of same generation.

(vi) **Upon a rule of law :** The consensus must be upon a rule of law, this is so because that all non- legal matter are excluded from the domain of Ijma. Thus an Ijma to be valid, must be based upon a rule of law.

(vii) **Should have relied upon Sanad (Evidence) :** The Mujtahids, who are taking part in Ijma, must have relied upon some sanad for deriving their opinion.

(8) HOW IJMA IS CONDUCTED : Ijma may be conducted by decision express in words or by practice of the jurists.

Ijma is said to be conducted by words, if the Mujtahids either at one meeting or on information of question being under consideration reaching them, within a reasonable limit of time, severally declare their opinion in so many words or if some one or more among the prominent mujtahids state their view and the others on hearing this at the meeting or on receiving information thereof observe silence, expressing no dissent.

An Ijma is conducted by practice, if all the Mujtahids in their practice adopt a particular view of the law or if some of them in practice adopt a particular view and the others do not indicate dissent by acting to the contrary.

Ijma by words and Ijma by practice are equally authoritative. The Hanafis, the Malikis generally, and some Shafi jurists consider both as valid in law and binding.

Q. 22. Ijma is a valid source of Islamic law? Discuss.

Ans. (1) MEANINGS OF IJMA : In the literal sense it means unanimity of opinion but in legal sense it is those principles of law which are accepted unanimously.

(2) DEFINITION OF IJMA : "It is defined as consensus of the jurists of a certain period of the Muslim community over a certain religious matter."

(3) IJMA AS A SOURCE OF ISLAMIC LAW : In an Islamic state, after Quran and Sunnah, Ijma is the third source of law and having authority of legislation. Under the circle of Quran and Sunnah's delegation many issues can be resolved by Ijma, such as:

(i) Enforcement of ordains of Quran and Sunnah : Dictates of Quran and Sunnah are natural and in accordance with the nature of mankind, the basis of human nature and culture do not change with the changing conditions but whenever cultural or social changes occur, Quran and Sunnah has flexibility which is enforced by enforcement of Ijma. For example, if after marriage differences cropped up and husband divorced or wife demand Khula, Quran tells the middle way that there should be one representation from each side who could resolve the dispute. This job was

conducted by the tribal Heads but this job is carried out by councillor now-a-days.

(ii) Interpretation of Sharia : New laws can be formulated according to the changed circumstances. For example, Quran narrates the eight objects of Zakat, out of them one is Mualifatul Quloob which means to spend money on those people who have left other religion and adopted Islam. In the period of Hazrat Umar the situation arose that the need ended so he stopped to Spend. Similarly if poor or needy class be ended in Islamic State, naturally this amount shall be spent on some other need. They decide the matter in this way that the objects of sharia kept on fulfilling.

Substitution of Ijma : Ijma of one period of jurists on a particular point of Sharia can be repealed by subsequent Ijma.

(iii) New legislation can be carried out : Under the guidance of Holy Quran and keeping in view the objects of Shariah new legislation can be carried out by Ijma. God has not ordained on certain matters to which the people have been bestowed the authority with certain limitations. Medical science has revealed so many new dimensions to human body as transfusion of blood, grafting of different organs, transfer of useable parts of animal to human beings, use of surgical instruments for operation, these are matters which have no clear cut direction from Allah and the Holy Prophet (P.B.U.H.) hence legislation can be carried out by Ijma. One of the example of this type we find in the regime of Hazrat Umar when he imposed Zakat tax on the horses which were kept for trade purpose. He also imposed Zakat on the production earned by sea reserviors. Before the aforesaid imposition of Zakat these were not in existence.

(iv) Preference on one of the Companions over the other : Companions have followed the sayings and the conduct of the Holy Prophet (P.B.U.H.) in different style due to some reasons. For example, in Hazrat Abu Bakar's period the punishment of drinking was 40 stripes because the Prophet had inflicted the same punishment but Hazrat Umar enhanced upto 80 stripes with the consensus of Companion.

Any how the two followings have been guiding line for subsequent followers. On the ground of certain basis like person of authority, juristic and reasonable reasoning, the decisions and

opinion of Companions can be preferred according to the prevailing conditions.

(v) **Ijma of Companion of Prophet** : Companions benefited by the Prophet who were acquainted with the temperament of Holy Prophet (P.B.U.H.). So they made several Ijma according to new conditions, which are as follows.

- (a) Hazrat Abu Bakar was elected as caliph by the Shura in the meeting of Majils-i-Aam held at Saqifa Bani-Sada-a shadowy surrounding specified for the general gatherings. His name was proposed by Hazrat Umar and accepted by others.
- (b) Hazrat Abu Bakar convened the meetings of Majlis-i-Aam to discuss the sending of troops under the banner of Hazrat Usman and taking of action against the apostates who refused to pay Zakat to the state. A hot debate took place and all were convinced by the arguments of Hazrat Abu Bakar. No action was taken by him until the shura gave its consent.
- (c) The people of Baitul Maqdis demanded that Hazrat Umar should himself go there and settle the terms of the treaty. The Shura was convened who decided that he may go.
- (d) Hazrat Umar wanted to command the battle of Faris personally. But the shura decided that he should stay back and he had to do so.

Q. 23. Write a detail note on Qiyas?

Or

Discuss the importance of Qiyas as a source of law?

Ans. QIYAS

(1) MEANINGS OF QIYAS.

(i) **Literal meanings** : Literaly Qiyas means measuring, accord and equality.

(ii) **Legal meanings** : Legally it means the process of deduction by which the law of a text is applied to cases which though uncovered by language are control by reason of the text.

(2) **DEFINITION** : Qiyas as a source of law has been defined by Hanafis as:-

"An extension of law from the original text to which the process is applied to a particular case by means of a common Illah, or effective cause, which is unascertainable merely by interpretation of the language of the text.

(3) **DEVELOPMENT OF THE CONCEPT OF QIYAS** : Owing to the ever growing needs of the society and the expansion of Islamic religion beyond the limited boundaries of Arabia, it was felt that the rules have to be deduced to meet the dynamic character of society. This is how the use of analogy grew and it is rightly, said that this supplementary source of law, which is the result of human research developed at least a century after the Prophet and was built upon the opinions of eminent individual jurists.

(4) **ARGUMENTS IN FAVOUR OF QIYAS:-**

(i) **Argument from Quran** : Quran Says:-

"So ask of those who know the scripture, if you know not."

(Al. Nahl, 43)

(ii) **Argument from Sunnah**: The Holy Prophet himself relied on analogy in deciding questions of law.

For example, a man whose father, a man of means, had died without performing Hajj, asked him if it was proper that it should be performed on behalf of his deceased father for the benefit of his soul.

The Holy Prophet (p.b.u.h.) replied "Tell me, what would you do if your father had left debts unpaid;

The Holy Prophet (p.b.u.h.) applied analogy of a debt to show that an undischarged religious obligation should be performed by the heirs of deceased.

(5) **ELEMENTS OF QIYAS** : The following are the elements of Qiyas.

(i) **Text (Nass)** : This is in the form of a specific precedent or a decided case which acts as an authority to decide the new case.

(ii) **New thing (Farra)** : This is like the case in issue having common characteristics with the parent thing.

(iii) **Law (Hukm-Al-Asl)** : This is the law laid down in the text.

(iv) **Effective Cause (Illah)** : It is the fact, circumstances which the law giver had in consideration when laying down any law.

(6) **KINDS OF QIYAS** : Qiyas is of two kinds:-

(i) **Qiyas jali** (ii) **Qiyas Khafi.**

(i) **Qiyas Jali, (Manifest)** : In this kind of analogy, the underlying cause is more or less apparent or can be discovered with relative ease.

(ii) **Qiyas Khafi (concealed)** : In this kind of analogy, the real illah is less apparent and the jurist has to expend considerable effort to discover it.

(7) **CONDITIONS FOR THE VALIDITY OF QIYAS** : For a correct analogical deduction, the following conditions are necessary.

(i) The law embodied in the text (either of the Quran or the tradition) to which analogy is to be applied must not have been intended to be confined to a particular state of facts.

(ii) The law of the text must not be such that its reason cannot be understood by human intelligence nor it be in the nature of an exception to some general rule.

(iii) The rule so deduced must not be contrary to a text law, nor covered by the words of the text.

(iv) The deduction must not be such as to involve a change in law embodied in the text.

(v) The analogy must not be applied to the vocabulary of the text but to the effective cause on which the law is based.

(8) **SCOPE OF QIYAS** : The Qiyas is a process of deduction which aids in discovering the law and not establishing new law, its main function is to extend the law of the text, to cases which do not fall within the purview of the text. It does not involve laying down of new rules of law but is a kind of exigencies upon the text.

(9) LEGAL STATUS OF QIYAS : There is no doubt that Qiyas occupies a place next to Quran, Sunnah and Ijma, but it do not rank so high as authority as these three primary sources of law.

The reason is that with respect to analogical deductions (Qiyas) one cannot be certain that what the law giver intended, such deductions resting upon the application of human reasons which is always liable to err. In fact it is maxim of the Sunni Jurisprudence that a jurist may be right or may be wrong. An analogical deduction (Qiyas), if agreed upon by the learned as a body assumes, however, a different legal aspect, but that is because of such agreement and not the strength of the reasons on which such collective decision may be founded.

Q. 24. Define Ijtehad and elaborate. What is the significance of Ijtehad in Islamic legislation?

OR

Ijtehad has got a significant role in the Islamic legislation. Discuss and illustrate?

OR

What is Ijtehad and what is its importance in Islamic Law and Islamic Legal System?

OR

Define and discuss Ijtehad as a significant source of Islamic Law with reference to contemporary world?

OR

Define and discuss Ijtehad as a source of Islamic Law?

OR

What is Ijtehad? How it can be distinguished from Taqlid?

Ans. (1) MEANINGS OF IJTEHAD

(i) Literal meanings : Literally Ijtehad means to strive to the utmost.

(ii) **Technical Meanings** : Technically Ijtehad means that effort which is made by mujtahid in seeking knowledge of the ahkam (rules) of shariah through interpretation.

(2) **DEFINITION OF IJTEHAD** : Ijtehad, as a term of jurisprudence, means the application by a lawyer of all his faculties to the consideration of the authorities of the law (that is, the Quran, the Traditions and the Ijma) with a view to find out what in all probability is law."

(3) ARGUMENTS IN FAVOUR OF IJTEHAD

(i) **From Quran** : In support of ijtehad there are lot of verses in the Holy Quran. Some of these verses are:

- (1) "Those who have vision should take a lesson." (Al Quran).
- (2) "As for those who strive hard in US (Our cause), we will surely guide them to our paths." (Al-Ankabut 69)
- (3) "Do they not then think deeply in the Quran, or are their hearts locked up (from understanding it). (Muhammad: 24)
- (4) "Of every troop of them a party only should go forth, that they (who are left behind) may get instructions in (Islamic) religion." (Al. Taubah: 122)

(ii) **From Traditions** : Following traditions are also in favour of Ijtehad:

- (1) "You should use your Judgment by Ijtehad, as who soever is assigned the task verily God smoothness his way".
- (2) When a Qazi uses Ijtehad in giving his judgment there are two rewards for him and if he goes wrong there is only one reward."

(iii) **Ijma of Companions** : Hazrat Abu Bakar once said that "One who dies intestate or has no heirs, I shall decide his inheritance by means of my own judgment and by using discretion."

(iv) **Saying of Imams belonging to the four Sunni Schools of thought** : It is not obligatory for one to agree to and follow what we say unless he is satisfied with the basics thereof."

(4) **CONDITIONS FOR VALID IJTEHAD** : Ibn-ul-Qayyim has set three conditions for the validity of Ijtehad:

- (a) That it may be resorted to only in the absence of an applicable text of the Shariah.
- (b) That in no way should it be contravene with the Shariah.
- (c) That the course of reasoning should not get entangled in any kind of sophistry or complication of expression which might affect the people's direct attachment to Shariah.

(5) **MODES OF IJTEHAD** : A Mujtahid may perform Ijtehad by adopting the following modes.

(i) **First Mode** : In first mode the jurist should stay as close to the texts as he can. He should focus on the literal meaning of the text *i.e.* he should follow the plain meaning rule.

(ii) **Second mode** : The second mode of ijtehad is confined to the extension of law from individual texts. This mode is then adopted when the set of facts awaiting decision is not covered by the first mode.

(iii) **Third Mode** : In the third mode, the reliance is on all the texts considered collectively. This means that legal reasoning is undertaken more in line with the spirit of the law and its purposes rather than confines of individual texts.

(6) **QUALIFICATIONS OF A MUJTAHID** : The author of Jamul Jawami enumerates the qualifications of Mujtahid as under:

- (1) He must be major *i.e.* has attained the age of majority.
- (2) Possessed of understanding and of sufficient intellectual acuteness to be able to grasp the drift of speech.

- (3) He must have average knowledge of the arabic language, grammar and rhetoric, the principles of jurisprudence and sources of law i.e. Quran and Sunnah.
- (4) He must be well versed with the main principles of Shariah or the legal code so as to be able to ascertain the intention of law giver.
- (5) He must know repealing and repealed text.

(7) DISTINCTION BETWEEN IJTEHAD AND TAQLID : (1) In Ijtehad, a law is derived from the text of Holy Quran and Sunnah, whereas in Taqleed, the opinion of another person is followed without knowledge of authority for such opinion.

(2) Ijtehad is permissible only in field where no rule of injunction from Holy Quran or Sunnah is available, the doctrine of Taqleed is applied only in case of those who do not possess the qualifications of a jurist.

(3) Ijtehad is the application of faculties by the lawyer to the consideration of the authorities of law, whereas taqleed does not make it incumbent for all Muslim to abide by it.

(4) Ijtehad is considered a source of law. Whereas taqleed is not considered a source of law.

(8) SIGNIFICANCE OF IJTEHAD IN ISLAMIC LAW AND ISLAMIC LEGAL SYSTEM : Like Quran and Sunnah, Ijtehad is also a basic source of Islamic law. It is exercised when the jurist of time is faced with a situation which to him is unparalleled and for which no clear text of the Quran and Sunnah or about which the analogy if made does not fit. It is a tool which the jurist use with a view to come out of the thick and profound darkness of any stagnation period in Islam.

The significance of ijtehad as a source of Islamic Law need not be over-emphasised. It is the exercise of ijtehad which has been responsible for so much development the Muslim community has witnessed in the Islamic Law. Moreover, the development of other

secondary sources of Islamic Law like Qiyas, Istehsan and even Istislah are the result of exercising this method of reasoning (Ijtihad). Thus we shall have to recognise that had there been no use of ijtehad. The whole complexion of the jurisprudence, which we have today, would have been different.

Q. 25. What are the qualifications of a Mujtahid? Discuss?

Ans. (1) MEANINGS OF MUJTAHID. : The word Mujtahid which is a nomen agent is means a scholar who can interpret the law authoritatively.

(2) QUALIFICATIONS OF A MUJTAHID : Following are the qualifications of a Mujtahid.

(i) Major : He must be major *i.e.* has attained the age of majority.

(ii) Sound mind : He must be soundmind and possessed of understanding and of sufficient intellectual acuteness to be grasp the drift of speech.

(iii) Muslim : He must be a Muslim. As a non Muslim is ineligible to make Ijtihad.

(iv) Knowledge of Arabic Language : He must have average knowledge of the Arabic language, grammar and rhetoric, the principles of jurisprudence and sources of law *i.e.* Quran and tradition.

(v) Well versed in Islamic Jurisprudence : He must be well versed in the science of Islamic Jurisprudence. And as regards juristic opinions he should be able to arrive at conclusions as to which of the conflicting views is correct or is more in consonance with the spirit of the Quran and traditions.

(vi) Knowledge of Quran : A thorough knowledge of Quran is necessary. It means that he should not only be able to read but also to under stand and interpret its verses. The interpretation of Quranic verses as well known is not an easy job. He must in other words, have command over the Arabic language.

(vii) Knowledge of Traditions : A thorough Knowledge of the Traditions is also necessary. He must be fully familiar with the traditions reported from the Holy Prophet (P.B.U.H.) and able to distinguish between authentic and unauthentic. Tradition, between the continuous and well known as one hand and the isolated on the other. He should also know the nature of the authority attached to each such tradition and be familiar with the rules for authenticity, leading to the genuineness of the traditions.

(viii) Knowledge of Ijma : The first source to be consulted before a Mujtahid begins his task of interpretation, is Ijma. If there is Ijma on an issue, he cannot reopen such issue. In addition to this knowledge of the principles up held by ijma will guide the Mujtahid on other issue.

(ix) Conversant with Rules of Analogical deduction : He must be aware of and full conversant with the rules and methods of analogical deductions. The mere fact that one is a competent commentator of the Quran or the Traditions does not *ipso facto* entitle him to be called a person fit to exercise ijtehad.

(x) Acquaintance with the theory of Repeal : He must be fully acquainted with the theory of Repeal, should be able to judge the repealed and the repealing texts and the circumstances leading to repeal.

(xi) Acquaintance with the Principles of Shariah : He must be well versed with the main principles of Shariah or legal code so as to be able to ascertain the intention of law giver..

(xii) Man of sound judgment and piety : He must be a man of sound judgment and piety, should be able to go behind whenever necessary or possible the texts and the objectives of Shariah.

Other Necessary Qualifications : Other necessary qualifications of a Mujtahid are as follows:

- (1) Faith and the courage of conviction.
- (2) Justice and piety.

- (3) A firm knowledge of Quran and other matters connected with it.
- (4) A firm grasp of the knowledge of Ahadith and of other allied matter.
- (5) A comprehensive understanding of Fiqah, the basic principles and other relevant matters.
- (6) Competence and advanced proficiency in Arabic language and literature.
- (7) A deep knowledge of the rules and spirit of Shariah and its intricacies and complexities.
- (8) A cogent understanding of modern development and a reasonable appraisal of contemporary exigencies.

The above mentioned qualifications, it must be pointed out, are a prerequisite before a person is designated as a jurists. It appears to be easy to think of but how difficult it is for one to equip himself with these requirements, simultaneously is a matter the reader will have imagined.

Q. 26. Write a note on Istehsan?

OR

Discuss and elaborate Istehsan?

Ans. ISTEHSAN

(1) MEANINGS AND DEFINITION OF ISTEHSAN.

(i) Meanings : The literal meanings of Istehsan is preferring or considering a thing to be good.

(ii) Definition

(i) Al-Bazdawi has defined Istehsan in these words.

"Moving away from the implications of analogy to an analogy that is stranger than it or it is the restriction of analogy by an evidence that is stranger than it."

(ii) Al-Hawani has defined Istehsan in these words.

"The giving up of an analogy for a stranger evidence from the Book, The Sunnah or Ijma".

(2) ARGUMENTS FOR ISTEHSAN:

(i) From Quran:

Quran says:-

(i) "Those who listen to the word, and follow the best (meaning in it), those are the ones whom Allah guided, and those are ones endowed with understanding." (39: 18)

(ii) "Allah desireth for you ease. He desireth not hardship for you". (185:2)

(ii) From Hadith:

The Holy Prophet (p.b.u.h.) says:-

(i) "Do equity to get equity"

(ii) "That which the Muslims find agreeable (hasan) is agreeable to God."

(3) ORIGIN OF ISTEHSAN:-

The origin of Istehsan goes to the period of Imam Abu Hanifa. The reason is that he is considered the expounder of this doctrine who undaunted in the wake of strong criticism advanced this concept and made judicious use of it wherever necessary.

(4) KINDS OF ISTEHSAN : Following are different kinds of Istehsan.

(i) Istehsan-e-Qiyasi : Under this type of Istehsan we can bend the law in the favour of people and society. For example, if you have more than one effective cause/common illats of one particular question of law, now it is you to decide that whichever is closer and favourable to people and society. Under this kind of Istehsan you will never find that what is in original text.

(ii) Istehsan-e-Zarurat : In this type it is to give preference to one Sunnah over the other. Here we have two Sunnahs then whichever is better to use or adopt, e.g., Islam strictly

orders the Muslims who attain the age of Majority to say prayer. Usually all Muslim say prayer by standing, but there are more than one Sunnah about saying prayer, i.e., by standing, by sitting, or by lying on the bed or floor. One is at liberty to prefer one way over the other but according to his needs.

(iii) **Istehsan-e-Ijma** : If two Ijmas are available on a similar question of law then under Istehsan-e-Ijma adopt one which is closer to Quran and Sunnah.

(5) **EXAMPLES OF ISTEHSAN** : (1) A contract of the nature of sale, according to the Islamic Law, in order to be valid, requires that the subject matter must be in existence at the time of deal. Proceeding analogically, a contract with an artist to supply a scenic picture at an agreed price and to be delivered later would be invalid. But according the principle of Istehsan such a deal has been validated as it is on the basis of necessity and the general practice of transactions.

(2) If the inhabitants of a certain town or a fort seek protection from the Muslims including the town or fort in agreement. Such protection according to Qiyas would apply only to the fort and town alone and not to their contents. But al-Shyabani holds that on the basis of Istehsan the protection will cover the fort and the town along their contents.

(6) **IMPORTANCE AS A SOURCE OF LAW** : As a source of Islamic Law, Istehsan has been given importance due to its following characteristics, namely:

- (i) It provides an opportunity to the jurist to deduce the rules according to true spirit and intention of Islam.
- (ii) It keeps the law fresh and up to date.
- (iii) It brings the flexibility in law.
- (iv) It aimed at removal of discrepancies and inequities in law.
- (v) It helps to decide cases of complex nature due to the growth of the social setup.

- (vi) It is more effective means than analogy for introducing new elements.
- (vii) It protects the people from the harshness and strictness of law.
- (viii) It is a panacea to the complication or inconvenience which is often faced while deducing law.

(7) OPPOSER OF THE DOCTRINE OF ISTEHSAN :

Imam Shafi was the great opposer of the doctrine of Istehsan. He has devoted a complete chapter on the refutation of Istehsan in his book kitab-alumm. He was of the view that "whoever resorts to Istehsan makes laws." Imam Ghazali has also followed Imam Shafi, and he has criticised it as a source of law.

(8) ISTEHSAN IS EQUITY : It has been rightly stated by Sir Abdur Rahim that Quran and Sunnah are legislation, and if analogy is common law, Istehsan is its equity. Just as in the case of English law, the concept of equity developed side by side with common law mainly designed to remedy the rigors or the strictness of the law and to import justice in the real sense of the word, based on the nations of natural justice, good conscience and equity, in the same manner Istehsan developed as the watch dog of analogical deduction.

Q. 27. Discuss and elaborate the theory of Istehsan and Qiyas under Islamic Law?

Ans. THEORY OF QIYAS AND ISTEHSAN

(1) MEANINGS OF QIYAS AND ISTEHSAN ;

(i) Meanings of Qiyas : Qiyas means the process of deduction by which the law of a text is applied to cases which though uncovered by language, are covered by reason of text.

(ii) Meaning of Istehsan : Istehsan means giving up of analogy for a stronger evidence from the Book, the Sunnah or Ijma.

(2) DIFFERENCE IN QIYAS AND ISTEHSAN : Qiyas is a fourth basic source of Islamic Law whereas it will be reasonable

to say about Istehsan that it is a kind of Qiyas. Like Qiyas, Illah is also present in Istehsan but it is hidden, and did not appear *prima facie*. By this reason the word Qiyas Khafi is used for Istehsan. Some jurists have tried to prove Istehsan a separate permanent source of Islamic Law from Qiyas. But the truth is that Istehsan is a kind of Qiyas.

(3) EXAMPLE OF QIYAS AND ISTEHSAN : The requirement of Qiyas is that in substitutory ablution clay would be considered alternative of water and it will be said that until there is Hadas, substitutory ablution will remain intact. But the requirement of Istehsan as compared to this is that fresh substitutory ablution should be for every prayer whether Hadas takes place or not.

(4) KINDS OF QIYAS AND ISTEHSAN:-

(i) Kinds of Qiyas:-

Qiyas is of two kinds, namely:

(i) Qiyas jali, (ii) Qiyas Khafi.

(ii) Kinds of Istehsan:-

Following are the different kinds of Istehsan.

(i) Istehsan-e-Qiyasi.

(ii) Istehsan-e-Zarurat.

(iii) Istehsan-e-Ijma.

(5) APPLICATION OF QIYAS AND ISTEHSAN:-

(i) Application of Qiyas : Qiyas is chiefly, applied to in those cases which though not covered by language, are governed by the reason of text.

(ii) Application of Istehsan : Istehsan is chiefly applied to in those cases which arise out of the complex conditions of a growing society when a strict adherence to analogy would fail to meet the wants of people.

(6) FUNCTION OF QIYAS AND ISTEHSAN:-

(i) **Function of Qiyas** : The main function of Qiyas is to extend the law of the text to cases which do not fall within the purview of the text. It does not involve laying down of new rules of law but is a kind of permissible exigencies upon the text. In other words it may be said that the theory of Qiyas merely helps us to discover the law and not to establish a new law. By application of Qiyas the law embodied in the text may be widened generally.

(ii) **Function of Istehsan** : The function of Istehsan is to decide those cases which arise out of complex conditions due to the growth of social setup and to remove inequality, hardship and inconvenience in law. It is based on public good and welfare. It is not an arbitrary opinion, but a method to take a right decision according to the circumstances of a given case.

It would not be out of place to add that it not only keeps the law fresh and up to date but also makes it flexible.

(7) ROLE OF QIYAS AND ISTEHSAN:-

(i) **Role of Qiyas** : Qiyas played a very prominent role to meet the present challenges of the changes of the law in the modern context. Qiyas helped to decide cases of varied nature due to the growth of social set up. It was anticipated by the Holy Prophet (p.b.u.h.). When he appointed Mauz bin Jabal as Governor of Yemen. The Prophet (p.b.u.h.) asked Ibne Jabal as to how he will decide the cases. He answered that he shall decide cases according to Quranic injunctions. The Prophet further asked that suppose he finds no law in Quran on a particular point then he replied that he will decide according to Sunnah of the Prophet. The Prophet again asked that if he finds silence of the above two sources on point in issue then he replied that he will use his own judgment. Therefore, it can be concluded that the Qiyas is based on the spirit of Islam.

(ii) **Role of Istehsan** : Istehsan has played a very prominent role in making the Islamic Law quite afresh and to meet the challenges of changing conditions of society. It brings the flexibility in law. It is an exercise of personal opinion by setting aside

the apparent and strict analogy in the interest of public benefit and justice. It is an absolute reasoning rather than analogical reasoning. It is no whim and arbitrary opinion. It is a way to correct decision according to the situation of determination of which requires legal acumen.

Q. 28. Discuss and elaborate Istidlal?

Ans. ISTIDLAL

(1) **MEANINGS OF ISTIDLAL** : The word Istidlal is a derivative of the word Istidlal which means the inferring a thing from another thing.

(2) **USE OF WORD ISTIDLAL BY JURISTS** : There is some difference of opinion between Hanafis on the one hand and Shafi's and Maliki's on the other hand on this subject. To the Hanafis, Istidlal is method of interpretation. But with the Malikis and the Shafis's Istidlal is the name for a distinct method of jurist ratiocination, not falling with in the scope of interpretation of analogy.

(3) **KINDS OF ISTIDLAL** : Istidlal is of three kinds.

(i) The expression of the connection existing between two propositions.

(ii) Istishabu'lhal.

(iii) The authority of revealed laws previous to Islam.

(i) **The expression of connection existing between two propositions** : The expression of the connection existing between one proposition and another without any specific effective causes.

Istidlal of this kind would only be understandable if the same is divided into the following four categories.

(i) **Connection between two affirmative propositions** : When the connection is between two affirmative propositions.

Example : Sale is a separate transaction and consent being a prime factor or transaction is another statement. Both are affirmative propositions which culminate in the conclusion that consent is a necessary factor for the transaction of sale.

(ii) **Connection between two negative propositions :** When the connection is between two negative propositions.

Example : The proposition that if a regular ablution (wadu) was valid without specific intention, then a substitutory ablution is also valid, or in other words since a substitutory ablution is not valid without specific purpose, a regular ablution also cannot be held valid.

(iii) **Connection between affirmative and negative proposition :** When the connection is between affirmative and negative proposition.

Example : It is argued that since the flesh of a horse is halal therefore, permissible as it is not declared forbidden. Thus the rule is that what is permissible cannot be forbidden.

(iv) **Connection between negative and affirmative proposition :** When the connection is between a negative and an affirmative proposition. The reasoning applied here is that what is not valid is presumed to be forbidden.

Example : A sexual intercourse between two unmarried persons is not permitted so it is forbidden.

(ii) **Istishab-ul-Hal :** It means seeking for a link, a name of process of settling the rules of Fiqah by argument. This process has especially been favoured by the Shafis's. It is a presumption that a state of things which are not proved to have ceased still exist or still continue.

Example : A man who has disappeared or who has not been heard of for long, the Shafi's and Hanafis both treat such a man as living, for all practical purposes, till his death is proved.

Shafi's recognised his inheritance rights in others estate which devolve upon him due to the death of a relative during his absence, in addition to the retention of his own estate.

The Hanafi do not recognise his inheritance right which devolve upon him during his absence. Their Istidlal is the presumption that the state of things till proved that it ceased to exist is valid to the extent that serves to protect existing rights.

Therefore in the above case they would agree with the Shafi's so far that they would not allow the property of the man who has disappeared to be distributed among the heirs but they would not recognise his right to inherit from the person who has died since the man's disappearance.

(iii) **Authority of previous revealed laws** : All such laws prevalent before Islam, which are not expressly against the Quran and traditions are valid. On this there is apparently no difference of opinion amongst the Sunni Schools.

(4) **CONCLUSION** : To sum the discussion on this subject we can safely state that Istidlal is nothing but a form of juristic ratiocination, which mainly depends upon the validity of a set of facts in which inferences are drawn in one way or another.

Q. 29. What is meant by Masahlih-ul-Mursala. Describe the conditions for their validity?

Ans. MASALIH-UL-MURSALA

(1) **MEANINGS:**

(i) **Literal Meanings** : Literally it means the acquisition of manfa'ah (benefit) or the repulsion of Madarrah (injury, harm).

(ii) **Technical meanings** : Technically it means the preservation of the purposes of Islamic Law in the settlement of legal issues."

(2) **DEFINITION**

(i) **According to Imam Ghazali.**

"Masalih, ul-Mursala is the consideration for what is aimed at for mankind in the law".

(ii) **According to Said Ramadhan.**

"The public necessities which fall within the purview of the objects of the law-giver and have got no identical or analogous precedent."

(3) CLASSIFICATION OF MASALIH-AL-MURSALA :

Jurists have classified Masalih-ul-Musrala, in accordance with acceptance and rejection by Shariah into four types:-

(i) The first type is masalah acknowledged by the law giver at the level of the lowest category (naw) this is called Qiyas (analogy).

(ii) The second type is masalah that is acknowledged by the law-giver at the level of the genus (jins). This is called masalah mursalah.

(iii) The third type of masalah is one that is not acknowledged by the Shariah. This is called an interest that is rejected or mulgha.

(iv) The fourth type is a masahah is that is neither acknowledged by the Shariah nor rejected. This type of masahlah is called strange. Source : *Outline of Islamic Jurisprudence by Imran Ahsan Khan Nayzee.*

(4) CONDITIONS FOR THE VALIDITY OF MASALIH AL-MURSALA : The conditions for the validity of Masalih-al-Mursala are the following.

(i) The issue on which Maslahah is intended to be exercised should not be related to religious affairs. It should pertain to worldly affairs, so that the policy or the Maslahah is determined by evaluating the issue in its proper perspective.

(ii) It should refer to the problems of daily necessities of life and not the luxuries. Thus the security for life religion, property and the caste and creed or the protection of Islamic ideology are the subjects which come with its purview.

(iii) It should not be contradictory to any rule of the Shariah.

(5) LIMITATIONS ON MASALIH AL-MURASALA : Imam Ghazali has imposed some limitations on the doctrine of Masalih-al-Mursala. These limitations are as follows.

(i) That the case should lie in the area of the darurat (necessities), that is, it should be one of the five top purposes of the Islamic Law.

(ii) That it should be definitive (qati), that is, we should be certain about the resulting consequences.

(iii) It should be general (Kulli), that is, it should affect the entire Muslim Ummah and be a public interest. Source : *Islamic Jurisprudence by Imran Ahsan Khan Nayzee*.

(6) ILLUSTRATIONS OF MASALIH-AL-MURSALA :

The jurists provide a number of examples to elaborate the concept of Masalih-al-Mursaler. Some of these are listed below.

(i) The use of force on an accused for theft with a view to make him confess his guilt is valid. The underlying idea is that by applying force we get to know the truth of the matter, no matter that the method appears to be unrefined. Therefore the Maslehat demands that such a course should be pursued as this is the policy of law.

(ii) The levy of tax on the rich class in the society with a view to meet or defray defence expenditure is again in accordance with the policy of law which Maslehat demands.

(iii) To reoccupy or takeover from the guilty the things which he was believed to have stolen is valid notwithstanding the fact that such things were not those which he state.

The foregoing examples serve to indicate how the Maliki jurists tried to make use of this doctrine and justified it as a process of reasoning.

Q. 30. Write brief notes on the following :-

(a) Istisna. (b) Rajat.

Ans. (a) ISTISNA : It is a form of contract in which the strict rule regarding the existence and delivery of the article or the price is still further relaxed. A transaction of this kind consists in ordering an artisan or manufacturer to make certain goods answering to a given description. Even the Hanafis do not insist on the advance payment of price in this contract. The legality of this form of contract is based on a custom which has prevailed from the time of the Prophet himself and is also justified having regard to the

necessities of business. It has both the characteristic as *Ijara* and sale. For instance, a contract of this kind lapses on the death of one of the parties just like a contract of personal services, but on the other hand, the man who has ordered the goods is entitled to refuse to accept it if he finds that they are not in accordance with the order.

(b) **RAJAT** : It means to come back or to resume. In Islamic Law there are two kinds of *talaq* or repudiation, one is *Rajat* or that permits of the husband resuming conjugal relations even after proclaiming repudiation. In case of *Talaq Ahsan*, i.e., the husband pronounces *talaq* once during *Tuhr* and then less the divorce become absolute by expiry of *Iddat* period and in case of *Talaq Hasan*, i.e., husband pronounces *Talaq* in three consecutive *Tuhrs*, before these forms of *Talaq* become absolute at the expiry of *Iddat* in *Ahsan* and third pronouncement in *Hasan*, husband can resume conjugal relations with his wife and *Talaq* is revoked. Such resuming of conjugal relations is called *Rajat*.

Q. 31. Write a note on Taqlid?

Ans. TAQLID

(1) MEANINGS AND DEFINITION OF TAQLID

(i) **General meanings** : Taqlid means the following of the opinion of the learned.

(ii) **Meanings as a term of Islamic Jurisprudence** : It means following the opinion of a jurist in matters which have not been dealt with by express Quranic or the Traditionary text or *Ijma*.

(iii) **Definition of Taqlid** : Ibn-al-Humam defines Taqlid as:-

"Taqlid is following the decision of a jurist without demanding arguments for that (due to confidence in his learning)."

(2) JUSTIFICATION OF TAQLID:-

(i) **From Quran** : Quran says:-

(1) "If you yourself do not know, then question those who do."

(43:16)

(2) "Obey Allah, obey the Messenger and those of you who are in authority." (59:4)

(ii) **From Hadith :** Prophet (p.b.u.h.) says:-

"Whoever among you will live after me, will see a big difference. Therefore it is necessary for him that he hold firmly my Sunnah and Khulafai-Rashdeen."

(3) **BRIEF HISTORY OF TAQLID :** Taqlid was prevalent in the period of Companions. Some companions who were not Mujtahid, followed those who were Mujtahid Companions. Upto the period of Banu Abbas four Sunni School of thoughts has come into existence. On the fall of Baghdad when Door of Ijtihad has been closed then by declaring the work of these four school of thoughts fully completed Taqleed has been followed. Now among the four Sunni School of thoughts Muslims generally follow one of them.

(4) **FACTORS RESPONSIBLE TO THE BEGINNING OF THE DOCTRINE OF TAQLID :** The factors which are responsible to the beginning of the doctrine of Taqlid are as follows.

(i) The Holy Prophet said, "The best generation is my generation, then the second and then the third and then shall come people in whom there would be no good." This Tradition is produced to substantiate the fact that period of Taqlid had to come in sooner or later.

(ii) It is generally believed that the emergence of the four Sunni Immas during the first three centuries of Islam witnessed considerable development activity in respect of Islamic Law. None could have exercised Ijtihad so well as did these four Imam. There was therefore little scope left for the later generations in the matter of Ijtihad, consequently the idea of Taqlid slowly but steadily gained ground.

(iii) It is also an acknowledged fact that a time comes when the precedents and traditions (traditions here means the general practices of the people), begin to command respect and sanctity. Hence consciously or un-consciously following the foot prints of the earlier authorities became the rule, rather than exception.

(iv) Taqlid received impetus when the administration gradually became loose. "The Muslim state was thus left generally in the hands of intellectual mediocrities" says Dr. Iqbal analysing the causes which reduced the law of Islam practically to state of immobility.

(v) Then came a stage when in the 13th century A.D., under the influence of Halaku Khan, a Mongol who was instrumental in the destruction of Baghdad, the Mujtahideen of the time fearing further disintegration, unanimously agreed to end Ijtihad and follow the four Sunni School this may be called the period of renaissance in Islam.

(5) APPLICATION OF THE DOCTRINE OF TAQLID :

The doctrine of Taqlid applies only in the case of those who do not possess the qualifications of a jurist. In fact if a jurist has formed his own opinion on a particular question he is forbidden to follow in preference the opinion of another jurist to the contrary.

Duty of Layman : A Layman who has not studied law and religion, must follow the guidance of the learned and it will be sufficient to absolve his conscience if he consults and acts upon the opinion of the man who is mostly noted for his religious learning.

(6) TAQLID IN THE PAKISTANI LEGAL SYSTEM :

The Constitution of Pakistan permits taqlid in Articles 189 and 201. These articles make the judgments of the Supreme Court binding on all Courts and the judgments of the High Courts binding on Courts subordinate to them. The doctrine of precedent and stare decisis are nothing more than institutionalised forms of taqlid. When the lower Courts follow the opinions of the higher Courts they are undertaking Taqlid (Taqlid in Pakistani Legal System; source Islamic Jurisprudence by Imran Ahsan Khan Nyazee).

Q. 32. Define Custom. What is its importance in Islamic Law? Enumerate the Major Customs of Arabs adopted by Islam.

OR

Describe the role of Custom in Islamic legislation with reference to Arabian Customs adopted by Shariah?

OR

Define Custom as a source of law in Islam. What is the status of pre-Islamic Customs?

OR

Define Custom and discuss its importance in Islamic Law?

Ans. CUSTOM

(1) DEFINITION OF CUSTOM : Custom has been defined as;

"Those recurring practices which are acceptable to people of sound mind."

(2) JUSTIFICATION OF CUSTOM

(i) Justification from Quran : The Quran says:-

(1) "And their maintenance and their clothing must be born by the father according to usage. (233:3).

(2) "And whoever is poor let him consume reasonably (or according to usage). (6:4)

(ii) Justification from Hadith : Prophet (p.b.u.h.) says:-

"You people are fully acquainted with your religious affairs".

(3) SAYINGS OF FUQQAH IN FAVOUR OF CUSTOM : Fuqqah has adopted custom as a source of Islamic Fiqah and gave it very high place. Below are giving some sayings of Fuqqah.

(i) "Custom is authoritative"

(ii) "The thing which is proved from Urf, is equal to be proved from Nass."

(iii) The thing which is proved from Urf (Customs), shall be considered to be proved in Islamic Shariah from Dalil--e-Shari.

(4) REASON FOR RECEPTION OF CUSTOM : The reason for the reception of custom was due to the fact that since

custom contains rules already generally accepted, so Court find it convenient to adopt it as law instead of making some new rules. Which may put them to trouble and cause hardship.

Again the adoption of custom as law provides a guarantee for its continuity in future. Moreover, it provides the material out of which the law can be framed.

Islam generally adopted those custom which did not conflict with any rules of the Quran and Hadith. These custom becomes part and parcel of the Islamic Law in the form of Ijma or Istehsan.

(5) CUSTOM AS A SOURCE OF LAW : Custom and usages of the people of a country which were not repealed or condemned by Islam were deemed to have been sanctioned by God and the Prophet. Custom comes next to the Quran, Sunnah and Ijma. Some pre-Islamic Customs which were not repealed were sanctioned by the silence of the Holy Prophet. Dr. Hamidullah says that what the Prophet had tolerated among his companions rendered it valid and lawful. The very toleration implies the recognition of custom, no matter old or new, as a source of law. As for late times the pervading maxims "Everything that is not prohibited is permissible" and custom or rule of convention is decisive leave not the slightest doubt that custom and usages, with certain qualification, are lawful sources of rules of conduct for the faithful.

(6) MAJOR CUSTOMS OF ARABS ADOPTED BY ISLAM : After narrating the general details about customs, now we narrate those major pre-Islamic Custom which Islam has adopted as a whole or after amendment and which it has rejected fully.

(A) CUSTOMS ADOPTED AS A WHOLE

(i) Custom of nikah : Before the advent of Islam. Nikah was in vogue in Arabs, Islam has adopted this custom and gave it a high place in Islamic Shariah.

(ii) Dower : There was also prevalent a practice of fixing dower in the Arabs at the time of making Nikah. Islam has also adopted this as a custom.

(iii) **Treaty of Peace** : Before the advent of Islam, this practice was in vogue in Arab tribes that they had made the treaty of peace with each other to live peacefully. Islam has also considered this practice of Arabs good and gave it a place in Islamic Law.

(iv) **Appointment of Arbitrator** : To decide different disputes, there was a custom of appointing arbitrator in the Arbas. Islam has also adopted this custom.

(v) **Sending of messangers** : There was also custom of sending messengers towards each other in the Arbas. And the life and property of these messengers have also been respected, whether they were from enemy side or not. Islam has also declared it agreeable and adopted it as a Custom.

(B) CUSTOMS ADOPTED BY ISLAM AFTER SOME AMENDMENTS.

(i) **Talaq** : When Islam came into being, then at this time the custom of giving Talaq was very common in Arabs. Islam has retained this one but with some amendment.

(ii) **Limit of Marriages** : There was no limit fixed for male of marriages. He can make so many marriages at one time. Islam has retained this one also but limited it to four at one time.

(iii) **Go to wives after giving, Talaq** : Arabs go to his wives after giving them so many Talaqs. Islam has retained this custom but made limited to it to Talaq Raji.

(iv) **Forms of Bai** : There was many reasonable and unreasonable forms of Bai in vogue. Islam has retained only the reasonable forms and declared others prohibited.

(C) CUSTOMS REJECTED BY ISLAM : Customs which have been altogether rejected by Islam are as follows.

(i) There were so many absurd ways of Nikah prevalent. Muata was also one of them. Islam has not only strongly opposed these ways but also declared them Haram.

(ii) Before Islam, this custom was also very common in Arabs that they used to bury their daughter alive as soon as born. This method was also in vogue in the time of Prophet (p.b.u.h.) Islam has condemned this method strongly and declared the daughter a blessing by God.

(iii) Adoption among the Arabs was also in vogue as a legitimate mode of affiliation. Islam has also opposed this method and declared it totally disagreeable.

STATUS OF PRE-ISLAMIC CUSTOMS : Custom and usages of the people of a country which were not repealed or condemned by Islam were deemed to have been sanctioned by God and silence of the Holy Prophet (p.b.u.h.).

(7) IMPORTANCE OF CUSTOMS : As far as the importance of custom in Islamic Shariah is concerned, it may be said that the importance of customs is not as much in Islamic Shariah as the other sources have. The status of customs is not like that of Dalil-e-Shari but they have been kept in view to that extent that because of them many Shari injunctions are affected. Moreover, Islamic Fuqqah has fixed so strict qualifications to declare customs as Dalil Shari that by reason of which these customs could not play an important role in the formation of Islamic Laws. And their status and importance become altogether reduced. We can say that customs have little bit interference in Islamic Shari Laws. But to say this that Islamic Laws are totally dependant upon on Custom is not correct. This is only and only the allegation of orientalist that Islam has adopted the customs of pre-Islamic Arabs and gave them the form of Islamic Law.

(8) ROLE OF CUSTOMS: As the Muslim Jurists have fixed so strict qualification for a custom to be valid, therefore only that custom may become the part of Islamic Laws if these qualifications have been fulfilled. As the laws which are present in Islamic Law on the basis of customs, they become the part of Islamic Shariah after going through these strict conditions. There shall be some pre-Islamic Customs which fulfill these conditions. So the reason is that customs could not play an important role in the codification of Islamic Shariah.

CHAPTER 4

ACTS, RIGHTS AND OBLIGATION

Q. 33. How are the 'Acts' classified by Muslim Jurists ? Discuss each class fully?

Ans. CLASSIFICATION OF ACTS : Acts (*afaal*) are divided into two broad classes of natural acts *hissi* حسي and juristic acts *Sharai*.

NATURAL ACTS : Natural acts are further sub-divided into those of body *afaalul-jawarih* افعال الجوارح, e.g., eating, speaking, walking, etc., and those of mind *afaalul-qalb* افعال القلب e.g., acts of belief, faith intention. *Afaalul-jawarih* can be seen and are cognizable by Courts, but *afaalul-qalb* cannot be seen.

PHYSICAL ACTS : Physical acts (*afaalul jawarih*) are further sub-divided into those of utterance (*qauli*) written, spoken or by gestures, and acts of conduct (*aml*)--conduct again may be of commission, e.g., walking, singing, etc., or one of omission (*tark*), e.g., one does not speak when ought to speak.

Example : A tells B (in C's presence) that C's friend Z loans money on interest as he loaned to C's and C keeps quite. This silence of C when he ought to have spoken amounts to conduct of C that whatever A is telling of Z to B is correct.

Acts of mind : Acts of mind (*afaalul-qalb*) may be voluntary (*tasarrufat*), or involuntary wherein no choice of (*ikhtiar*), of action is called for, e.g., forgetfulness, sleep, walking. Voluntary acts of mind are further sub-divided into :

(i) *tasarrufat Sharai*, i.e., if they are also lawful according to Shariat Law.

(ii) *tasarrufat gher Sharai*, i.e., unlawful in Shariat.

JURISTIC ACTS : We come now to the classification of juristic acts. These are compound acts made of natural (physical) and natural (mental), or *hissi* acts. Take the case of formation of a contract. It has mental element (intention) and physical element

(offer and acceptance). Similarly prayer is made up of a number of physical and mental acts. Another instance is *iman* (a bundle of faiths and belief of a Muslim).

Juristic acts may further be mental acts *qalbi* (*Sharai*), e.g., acts of faith or *itiqadat* (which being mental cannot be seen), and physical acts (*jawar Sharai*). Physical juristic acts are further subdivided into originating acts '*insha'at*', e.g., sale, gift, marriage (These acts are originate transaction); and informative acts, i.e., which describe an event, e.g., evidence, admission and confession, narration and tradition, etc.

Insha'at are further classified into those which are revocable acts, i.e., those whose legal effects can be annulled, e.g., sale, lease, and those which are irrevocable, e.g., divorce, vow, releasing a debt, renunciation of a right, freeing a slave, etc.

Those physical juristic acts which create rights are called *isbatat*, e.g., creating right of proprietorship in the donee or purchaser of a property. Those physical juristic acts which correspondingly extinguish rights are called *isqatat*, i.e., release of a debt, freeing a slave, etc.

From the point of view of their validity or legal effect the juristic acts are further sub-divided as follows :

(i) **Valid (Sahih) Act** : Valid (Sahih) act, i.e., if all the elements (*arkaan*) or ingredients and essential conditions (*sharayyat*) are performed. Take an example: In case of marriage contract, offer and acceptance between the intending spouses is essential, but the presence of two witnesses is not absolutely compulsory. So if A marries B, with offer and acceptance, and, in the presence of two witnesses, then the contract is valid and all legal rights and obligations follow.

(ii) **Irregular ('fasid') Acts** : Here the juristic act concerned is duly performed in its essentials, but there is some procedural defect. The consequence is that, still as in case of valid acts, the legal rights and obligations arise. Example of an irregular act is marrying a woman but not in the presence of two witnesses.

(iii) **Void (batil) Act** : If a person marries by one contract, contemporaneously two real sisters then the marriage is void *ab initio* being one contravening Qur'anic Law. He is guilty of *zina*. No legal rights and obligations arise in a void act. If a person makes a will and gives thereby his property to one of his sons, then the will is void. No will can be made of.

Q. 34. Into how many Classifications have the Rights been placed by Muslim jurists ? Discuss each class fully.

Ans. CLASSIFICATION OF RIGHTS OR HAQOOQ : Rights having regard to the person of inheritance are principally classified by Muslim jurists into Rights of God and Rights of Men.

(1) HAQOOQ-UL-ALLAH OR RIGHTS OF GOD : Rights of God are such as to involve benefit to the community at large and not merely to a particular individual. They are referred to God because of the magnitude of the risks involved in their violation and of the comprehensive benefits which would result from their fulfilment. It is not to be understood that those rights are called the rights of God, because they are of any benefit to God, for He is above all wants, nor because they are the creation of God for all rights are equally the creation of God who is the Creator of everything. The Rights of God correspond to public rights and since the Islamic Law regards the observance of obligatory devotional acts as being beneficial to the community, they can be called as public rights. The main distinction between Rights of God and Rights of Man is this, the enforcement of the former is a duty of the State, while it is at the option of the person whose private right is infringed, whether to ask for its enforcement or not.

Rights of God have been further classified as :

1. Matters which are purely the Rights of God.
2. Matter in which the rights of the community and individual are combined but those of the former preponderate.

The example of the above two is acts of devotion *Ibadat* and Punishments, etc.

(2) HAQOOQ-UL-ABBAD OR RIGHTS OF MEN : These rights are generally known as private rights of a man and are too numerous to be mentioned. As far their enforcements is concerned it is entirely at the discretions of the individual injuriously affected by the infringement of his private right, whether to pardon the wrong-doer or to insist upon redress. They can be of two kinds :

1. Matters which are entirely the right of individual man, such, as a right to be enforcement of contracts, protection of property and the like.

2. Matters in which public and private rights are combined but the latter preponderate. *Qisas* or retaliation which is the punishment for murder or voluntary hurt is a right of this kind. In such case it also depends upon the individual thus hurt to pardon the offender or accept money in satisfaction thereof or get him punished.

Example : Debtor owes to the creditor whatever he has borrowed from the creditor. If A owes Rs. 100 to B, then only A is under an obligation to pay Rs. 100 to B and not the whole community. But the whole community is under an obligation not to hurt or defame A.

Rights of men include rights such as :

Right to safety of person; right to reputation; right of ownership; family rights, as marital; succession and guardianship rights; rights to do lawful acts.

Rights are again classified into original and substitutory rights.

(a) **Original :** Original ('*Asl*') right is called 'antecedent right' in English Jurisprudence. 'Original' right of God is that one should perform '*wuzoo*' (ablution), with water. Its substitutory right is that in sickness, *taimum* is allowed.

(b) **Substitutory :** Substitutory right is called 'remedial right' in English Jurisprudence. "Original" private right of purchaser is the specific performance of a contract. But if specific performance

has become impossible, "substitutory" private right of the purchaser is to recover damages for non-performance of the contract.

Table of classification of rights :--

- | | |
|----------------------|-------------------|
| 1. (a) Rights of God | |
| (i) Pure. | (ii) Mixed. |
| (b) Rights of men | |
| (i) Pure. | (ii) Mixed. |
| 2. (i) Independent | (ii) Dependent |
| 3. (i) Original | (ii) Substitutory |

Classification of Rights according to Muslim jurists

(1) **PUBLIC RIGHTS** : The public rights are purely the rights of God and involve benefit to men generally. For example, infliction of punishment of hadd for theft is such a right and the person whose property has been stolen is not entitled to condone the offence. Other instances are acts of devotion, pure and simple faith or iman, and consequential duties like prayers, zakat, fast, jihad, etc.

(2) **PRIVATE RIGHTS** : The private rights are the rights of individuals. For example, enforcement of contract or protection of property etc. The enforcement of such rights is at the option of the person whose right has been infringed.

(3) **COMBINATION OF PUBLIC AND PRIVATE RIGHTS** : Matters in which rights of community and rights of individuals are combined but the public rights supersede. For example, right to punish a slanderer who imputes unchastity to another person belongs to this class according to the Hanafis. By such imputation, the rights of community is infringed by reduction of honour of one of its members and rights of individual slanderer is violated inasmuch as slander tends to destroy ones privilege in society.

(4) **COMBINATION OF PUBLIC AND PRIVATE RIGHTS WITH PREFERENCE TO PRIVATE RIGHTS** : Matters in which private and public rights are combined

but private rights supersede. For example, qisas or retaliation which is the punishment for murder and zarar, is a kind of such right.

Classification of Public rights : According to Muslim jurists, public rights are classified into the following categories :--

- (1) Acts of devotion like pure and simple faith or iman and consequential duties like prayers, zakat, hajj, jihad, etc.
- (2) Punishment of perfect nature known as hadd for offences of drunkenness, theft, adultery slander, etc.
- (3) Punishment of imperfect nature like depriving a man who has killed another of his right of inheritance if he be the legal heir of whom he had killed. This is imperfect as it inflicts no physical and monetary suffering.
- (4) Acts having partake of nature of both devotion and punishment. for example, atonement of certain obligation for non-discharge of certain duty. For example, release of slave, feeding the poor, etc.
- (5) Acts involving import consisting in an obligation of making payments of ones own possession. For example payment of certain amount as fitrana at the occasion of Eid-ul-Fitr.
- (6) Imposts having sense of worship. For example Ushr.
- (7) Imposts having sense of punishment. For example Khiraj, Jizya, (a liability on non-Muslims).
- (8) Acts which exist by themselves. For example acquiring 1/5th of booty obtained in religious wars which are reserved by law for distribution among the poor.

Classification of Private rights : Original private rights are ;

- (1) Right to property
- (2) Right to safety
- (3) Right to ownership
- (4) Family rights including:-
 - (a) Marital rights

- (b) Rights of children and poor
- (c) Right to guardianship
- (d) Right to succession
- (e) Right to inheritance
- (5) Right to contract and ex-contracts
- (6) Right to do lawful acts.

The rights of men are, however, simpler in concept and easier to imagine as after all they are the concern of a particular individual. As in case of English law, rights pertaining to a person may be his rights to liberty, safety, reputation, property, freedom of contract and other rights connected with his family are all his personal rights or say private rights. The same holds good in Islamic Law also and that is why they are known as rights of men.

Q. 35. What are public and private rights? Discuss.

OR

What is meant by public and private rights. Which one is more important?

Ans. RIGHT : Sir Abdur Rahim defines right as follows.

"Right means the authority recognised by the law to control in a particular way the action of the person against whom it exists, the latter being obliged or under an obligation to act as required."

(1) PUBLIC RIGHTS AND PRIVATE RIGHTS.

(i) **PUBLIC RIGHTS :** By the public right is meant that which comprehends a public benefit, not peculiar to any individual. It is referred to God because of greatness of its significance and generality of its benefits (Public rights are also known as Right of God).

Kinds of Public rights : Public rights can be of two kinds, namely:

Pure rights : Matters which are purely the rights of Allah.

EXAMPLE : Infliction of punishment of Hadd for theft is such a right and the person whose property has been stolen is not entitled to condone the offence.

Combined rights : Matters in which public rights and private rights are combined but the public rights supersede.

EXAMPLE : Right to punish a slanderer who imputes unchastity to another person belongs to this claim. By such imputation the rights of community is infringed by reduction of honour of one of its members and rights of individual slanderer is violated in as much as slander tends to destroy one's privilege in society.

CLASSIFICATION OF PUBLIC RIGHTS : Public rights which are purely the rights of Allah has been again classified into following eight heads.

(1) **PURE DEVOTION :** Acts of devotion like pure and simple faith or iman and consequential duties like prayers, Zakat, Hajj, jihad, etc.

(2) **PERFECT PUNISHMENT :** Punishment of perfect nature known as Hadd or offences of drunkenness, theft, adultery, slander, etc.

(3) **IMPERFECT PUNISHMENT :** Punishment of imperfect nature like depriving a man who has killed another of his right of inheritance if he be the legal heir of whom he had killed. This is imperfect as it inflicts no physical and monetary suffering.

(4) **DEVOTION AND PUNISHMENT :** Acts having partake of nature of both devotion and punishment. For example atonement of certain obligation for non-discharge of certain duty.

(5) **OBLIGATION OF MAKING PAYMENT :** Acts involving impost consisting in an obligation of making payments of one's own possession. For example payment of certain amount as fitrana at the occasion of Eidul Fitar.

(6) **SENSE OF WORSHIP :** Imposts having sense of worship, for example usher.

(7) **SENSE OF PUNISHMENT** : Imposts having sense of punishment, for example khiraj, jiziya, (a liability on non-muslims).

(8) **ACTS WHICH EXIST BY THEMSELVES** : For example acquiring 1/5th of booty obtained in religious wars which are reserved by law for distribution among the poor.

(ii) **PRIVATE RIGHTS** : Private rights are those rights which are not attributed to God but to the particular individual. They relate to the person concerned in which the community is not involved (These rights are also known as rights of men).

(1) **KINDS OF PRIVATE RIGHTS** : Private rights can be of two kinds:

(i) **Pure rights** : Matters which are entirely the right of individual man.

EXAMPLE : Enforcement of contract or protection of property etc. The enforcement of such right is at the option of the person whose right has been infringed.

Combined rights : Matters in which private and public rights are combined but private rights supersede.

EXAMPLE : Qisas or retaliation which is the punishment for murder and zarar, is a kind of such right.

(ii) **Classification of private rights** : Original private rights are--

- (i) Right to property.
- (ii) Right to Safety.
- (iii) Right to Ownership.
- (iv) Family rights including.
 - (a) Marital rights.
 - (b) Right of guardianship.
 - (c) Right to succession.
 - (d) Right to inheritance.

(v) Right to contract and ex-contracts.

(vi) Right to do lawful acts.

DIFFERENCE BETWEEN PUBLIC AND PRIVATE RIGHTS : The main point of difference between Public and Private rights are as follows.

PUBLIC RIGHTS

- (i) Public rights are purely right of God.
- (ii) Enforcement of public rights is the duty of state.
- (iii) In public rights, individuals cannot condone the act of offender.

PRIVATE RIGHTS

Private rights are entirely the rights of Individuals.

Enforcement of private rights is entirely at the option of the individual whose such right is infringed.

In private rights, it is entirely at the discretion of the individual injuriously affected, whether to pardon the wrong doer or insist upon redress.

WHICH ONE IS IMPORTANT AND WHY : Public Rights (Haqooq-ullah) and Private Rights (Haqooq-ulabbad) both are equally important. Public Rights are rights of God over men, therefore their performance is obligatory upon every men and women. Private Rights are rights of men over men, the performance of which is also obligatory upon every men and women. One thing which is necessary to mention here about these rights is that failure to perform public rights shall be pardoned by God but with respect to private rights it shall not be pardoned until the person whose private right is infringed pardoned the wrongdoer. This is the reason that in Islamic teachings, great emphasis has been put on the performance of private rights. Moreover a question will be asked at the day resurrection about the performance of private rights. So by this reason the public and private rights both are equally imported and no one can dare to deny their such importance.

Q. 36. Into how many Classifications have the Obligations been placed by the Muslim Jurists? Discuss each class.

Ans. CLASSIFICATION OF THE OBLIGATIONS: Obligations having regard to their origination may be generally classified into three classes :--

(1) Obligations arising by the implication of law :

- (i) towards God or the State, for example, obligations to worship, to pay taxes, etc.;
- (ii) towards individuals, such as those arising out of family relations, namely connubial parental, filial and kinship and out of constructive trusts ;

(2) Obligations arising out of a man's own acts of utterance, that is, rights *ex contractu* or by the admission of another's claim ;

(3) Obligations arising by reason of conduct infringing another's rights relating to :

- (i) personal safety,
- (ii) the doing of lawful acts,
- (iii) reputation,
- (iv) family rights,
- (v) ownership and possession.

Obligations of I and II classes relate to acts which are designated as obligatory (*farz*) and those of III class arise by the commission of acts which are forbidden (*haram*).

OBLIGATIONS PER SE AND OBLIGATIONS TO DO AN ACT: Further Hanafi jurists make a distinction between obligation *per se nafsul-wajub* and obligation to do or perform certain acts *wajubul-ada*. The first consists in the liberty of the obliged being restricted with reference to certain matters, and the second in his obligation to release himself from such restrictions. That is to say one is the incidence of an obligation and the other is

the discharge of such obligation. Obligation of the last kind arises when the law demands it and not until then. On the other hand, the mere incidence of certain obligations may have existed antecedently. The obligation, for instance to perform certain appointed acts of devotion, is said to have existed from eternity, but that it becomes ripe for fulfilment only after a man has attained the age of discretion, and is required to be fulfilled only when the hour fixed for the performance of such devotional exercises has arrived. Here the attainment of majority and the arrival of the particular time of the day are regarded as the causes for the discharge of this obligation, the former being preparatory and remote and the latter the proximate and effective cause.

The declaratory laws as already mentioned deal with the origination, transfer and extinction of rights and obligations. A declaratory law derives its character and such by reason of the connection existing between one fact and another. If the connexion between the two be such that one is included in the other, the former is called *rukṇ* (ركن) or constituent of the latter. If one fact directly brings about another fact its legal result the former, as we have seen, is regarded as the *illat* (علل) or effective cause of the latter. If one fact leads to another fact on the whole that is to say, not directly and immediately by remotely the one is called the *sabab* (سبب) or preparatory case of the other. If the existence of one fact be dependent on the existence another fact, the latter would be called the *shart* (شرط) or condition of the former. Until the fact which is the condition of a law happens, the effective cause will not come into operation. When the existence of a fact is indicated by, but does not depend on, another fact the latter is called the (*alamut* علامه), or sign of the former.

CHAPTER 5

LEGAL CAPACITY

Q. 37. What is legal capacity? How it is defective and what are the consequences of its defect?

OR

What is legal capacity? What factors may cause defect in it and what are the consequences of this defect?

Ans. (1) DEFINITION OF LEGAL CAPACITY : In Arabic language, legal capacity is called Dhimma. It is defined as:-

"The equality by which man becomes fit for what he is entitled to and what he is subject to".

(2) KINDS OF LEGAL CAPACITY : Legal capacity is of two kinds.

(i) Receptive capacity.

(ii) Active capacity.

(i) Receptive capacity : It is a capacity for inheritance of rights and obligations. For example child yet to be born has also some capacity. Which enables him to inherit. This is a receptive capacity as he cannot do more than this.

(ii) Active capacity : This is a capacity which enables one to exercise his rights and discharge his obligations.

Active capacity is further of two kinds:-

(a) Complete capacity.

(b) Imperfect capacity.

(a) Complete capacity : This capacity is found in a human being after his birth. This makes him eligible for the acquisition of all kinds of rights and obligations. Complete capacity for execution is established for a human being when he or she attains full mental development and acquires the liability to discriminate.

(b) **Imperfect capacity** : This capacity is assigned in cases where the basis of capacity, being a human and possession of discretion, are present, but an external attribute has been introduced that does not permit the recognition of the legal validity of certain acts (complete and imperfect capacity. Source: Outlines of Islamic Jurisprudence by Imran Ahsan Khan Nazee).

(3) **FACTORS CAUSING DEFECT IN LEGAL CAPACITY** : The Muhammadan Jurists divide the factors that cause defect in legal capacity into two classes.

- (i) Samawi or Natural.
- (ii) Maksuba or Acquired.

(I) **Samawi or natural** : Such factors which are work of providence and beyond the control of man. For example, forgetfulness, sleep, infancy, lunacy, idiocy, Death illness, etc.

EXPLANATION OF NATURAL FACTORS AND THEIR CONSEQUENCES:

(i) **Forgetfulness** : This is a state of lack of memory which according to the jurists, is brought by nature and is not attributable to man's act. Hence the rule is that an act done out of forgetfulness does not render the person legally liable. It forms good excuse in matters of right of God.

For example eating, during fast or omitting to do a particular thing, which in the course of prayer is necessary does not hold him liable and therefore such an act of omission or commission does not affect the legal capacity of Muslim. On the other hand, for any act done by him in matters of rights of men he is held liable though done out of forgetfulness. For example if he caused injury to another person by violating a private right or if he damages another's property, his legal capacity will be considered intact.

(ii) **Sleep** : This is a state of suspense in man's condition as it incapacitates a person. He has during sleep or a state of drowsiness no proper judgment to know what he is doing, therefore, he will not be held liable for acts under such conditions. In this case also the jurists have made a distinction stating that in so far as

creative acts or the acts of information are concerned, like making statements or signing any document. They would be considered void, but if a man in such a condition damages another's property, he may be held liable.

(iii) **Infancy** : The position of a minor for his acts from the legal standpoint is the same in Islamic Law as in the English Law. All acts done by him, if for his benefits are upheld, as regards his liability of the acts he is liable if they infringe the private rights of others. He has to pay compensation which ofcourse his guardian will pay, he is not liable for blood money nor is he liable to be deprived of inheritance rights, he acquire from a person whom he has killed. He is not liable for public rights or the rights of God. i.e., He is exempted from devotional acts such as prayer, fasting etc. He is also exempted from the punishment of Hadd.

In nutshell whatever is beneficial to him stands and whatever is injurious to him or his welfare does not stand.

(iv) **Lunacy** : The legal capacity of an insane person is, except as to acts done in lucid interval, is affected in the same way as infants with discrimination. For example, A is a lunatic and attempts to destroy B's car.

(v) **Idiocy** : An idiot stands on the same footing as an infant, without discrimination. For example, A is an idiot attempt to put B's house on fire.

(vi) **Death illness** : Sickness does not destroy a person's legal capacity but only brings about, physical and mental weakness. In case of *Fatimaa Bibi v. Ahmad Baskh*, it was held that no particular in capacities of such a person can be infallible signs for death illness.

(II) **Maksooba or Acquired** : Those factors which are created by human act. For example, intoxication, coercion, ignorance of law, ignorance of facts, and insolvency.

EXPLANATION OF ACQUIRED FACTORS AND THEIR CONSEQUENCES

(i) **Intoxication** : Drunkenness is a state caused in a human being due to the use of an intoxicant, which temporarily suspends the proper functioning of the mental faculty. If the intoxicant is

taken in extreme emergency it is permitted, although it is forbidden to according to Islamic Law. Thus the legal capacity of a man remains intact.

The causes of intoxication may vary, the legal capacity is effected if he is forced to drink an intoxicant and any disposition of property in such a state is void in law. If he voluntarily drinks, his legal capacity remains intact with the result that acts like signing document purporting to the transfer of property are regarded as good. He is declared liable in as much as he did it with full knowledge of the consequences of his act which law had expressly forbidden.

(ii) **Coercion** : It is a circumstance which affects one's consent. It is according to Islamic Law of two kinds.

(a) **Constraining** : That type of coercion which tends or threatens to destroy a man's life or damage a limb.

(b) **Non-constraining** : That type of coercion which does not threaten life but it is exercised by imprisoning, confining, or beating.

If coercion is not grave one should not give in; otherwise he would cause his consent vitiated and break the law. This does not affect the legal fitness of a person as the coercion is mild, in which case his legal capacity is unaffected. If the coercive act is not mild but grave, all acts involuntarily done by them, that is under forced circumstances, do not render him liable and consequently he is considered to be legally not fit to do; that he otherwise would not have done.

(iii) **Ignorance of law** : It is well known to all that ignorance of law is no excuse. There are however, two ways to explain it. As regards, the common man, act done by him in clear violation of a rule of Islamic Law (we mean here Quranic Traditionary texts) do not protect him as he has done them wilful knowledge of their invalidity.

As far as judges or jurists are concerned their judgments, if contrary to basic tenets of Islamic Law, are not operative. But the

jurists or judges decisions on questions which are not clearly covered by Quran and Traditions or Ijma are operative and such an ignorance of law is said to be excused.

(iv) **Ignorance of fact** : It can be pleaded as a good excuse for anything done wrongly. For example Z agrees, with B for the sale of his horse but the fact was that when they entered into this contract the horse was dead.

(v) **Insolvency** : If a person becomes insolvent, that is, his assets fall short of his debts and liabilities. When a Court of competent jurisdiction so declares. His legal capacity becomes defective in the eye of law. For example, Z, a solvent was declared as insolvent by the Court, he cannot become surety for anyone.

CHAPTER 6

OWNERSHIP AND POSSESSION

Q. 38. Define and discuss the concept of Ownership under Islamic Civil Law. What are the modes of acquiring and losing ownership?

OR

What are modes of acquiring Ownership and losing it in Islam?

Ans. (1) DEFINITION OF OWNERSHIP

(i) **Meanings :** The Arabic word for Ownership is *milkiyyah* which literally means relation of owner with the thing owned."

(ii) **Definition**

(a) **According to Sadru'sh Shariat :** Ownership is the expression of the connection existing between a man and a thing which is under his absolute power and control to the exclusion of control and disposition by others."

(b) **According to English Jurisprudence :** It means a right which avails against every one who is subject to the law conferring the right to put thing to user of indefinite nature."

(2) **SUBJECT MATTER OF OWNERSHIP :** The subject matter of ownership is some physical object, termed as *Mal*. There could be no ownership, the subject matter of which is not *Mal*. The Ownership and physical object go together, one cannot own that which is not material object."

(3) **ISLAMIC CONCEPT OF OWNERSHIP :** The Islamic concept of ownership is totally different from other concepts of ownership. Following points are notable in this respect.

- (i) The real owner of each and every thing is only and only the Almighty God.
- (ii) The proprietary rights of ownership has been given by God.

- (iii) No body is authorised to use the private ownership of any person without his consent.
- (iv) There is a right fixed for poor and needy in the ownership of that person who is Shahib-Nisab.
- (v) Acquisition of ownership must be by some legal ways.
- (vi) Use of ownership must be within the limits prescribed by God.

(4) TERMS ASSOCIATED WITH ISLAMIC CONCEPT OF OWNERSHIP : The following terms are closely associated with Islamic concept of ownership.

(a) **Milk :** It is used for the thing itself over which the power of the owner extends.

(b) **Malik (Owner) :** The person whose control over a thing is exclusive is called Malik.

(c) **Mal :** The thing over which the juristic conception of milk, i.e. ownership extends is physical object termed as Mal.

(5) KINDS OF OWNERSHIP : Ownership is of three kinds:

- (i) **Milk raqba :** Ownership of proprietary rights
- (ii) **Milk u, l-yad :** Ownership of the rights of possession.
- (iii) **Milk u, l, tasarruf :** Ownership of the right of disposition.

(6) MODES OF ACQUISITION OF OWNERSHIP : According to Islamic law, Ownership could be acquired in any of the following ways.

- (i) By Mawat.
- (ii) By Trade.
- (iii) By Hunting.
- (iv) By Gift

(v) By Succession

(vi) By Will

(vii) By Iqtaa.

(i) **By Mawat** : If a land is not the property of any one, nor it forms part of the pasture or forest belonging to village then it is a Waste land and whosoever secures and revives this land with the sanction of the head of the State, he gets the ownership of that land, so this is the first mode through which ownership can be acquired.

(ii) **By trade** : Trade is a big mode of acquiring ownership. If it is made within the prescribed limits of Islam and without interest then the profit gaining from it will also be counted in ownership.

(iii) **By hunting** : Through hunting one can get the ownership of a mal (thing) Here Mal means free birds, animals and fishes. Hunting may be made with the help of animals, weapons, or it may be made by way of a trap.

(iv) **By Gift** : Transferring of a thing from one person to another person without any consideration is called gift. By this act ownership can also be acquired. That means to say, when one person delivers a thing to another person in the form of gift then such person to whom the thing is delivered becomes its owner. The person who makes gift called doner and person to whom favour it is being made called donee.

(v) **By Succession** : When a person dies, all his property whether movable or immovable passes to his legal heirs according to the proportion fixed by Shariah and in this way his heirs become its owner through succession.

(vi) **By will** : Will is also considered a mode of acquiring Ownership. So if a person gets some thing W through will then he is the owner of that thing. But the Will must be of 1/3rd of the total property.

(vii) **By Iqtaa** : An Islamic State can give a barren land to any person for cultivation. Such land is called Iqtaa and this Iqtaa is considered the ownership of that person. So Iqtaa is also a mode of acquiring ownership.

(7) **MODES OF LOSING OWNERSHIP** : Losing of ownership may be in the following ways.

(i) **By Sale** : If a person sales out any thing, then his ownership to that thing will be extinguished and will pass to that person to whom property or thing has been soldout.

(ii) **By Gift** : If a person makes a gift of anything then his ownership to that thing will be extinguished and will pass to that person to whom gift is made.

(iii) **By death of owner** : If a person dies, then his ownership extinguishes due to his dealth and passes to his legal heirs.

(iv) **By extinction of a thing** : If a thing over which a man shows his ownership is extinguished then in that case ownership of owner over that thing is also extinguished.

(v) **By Operation of law** : One may lose his ownership over a thing by operation of law.

Q. 39. Write a short note on the concept of Contract in Islam.

Ans. CONTRACT : Contract is called "aqd" in Islamic Jurisprudence. It is a bilateral transaction in contract with a unilateral transaction like will, needing proposal (*ijaab*) and acceptance (*qabool*). It is a transaction which gives rise to legal effects.

ESSENTIALS OF CONTRACT : The essentials of a contract, under Islamic Law, are :--

- (1) Two parties or '*faa-lia*' to the contract, possessing full legal capacity that is to say they should be of the age of majority and of sound mind.
- (2) One party should make the offer (*ijaab*) and the other party should accept (*qabool*) that proposal. Offer and acceptance are the *sine qua non* of a contract.

- (3) Although no formality is necessary for a contract, yet some outward manifestation (*suriah*) is necessary for the declaration of an offer and its acceptance. Actual delivery of the possession of gifted property by a donor to the donee is an example of such '*suriah*'.
- (4) The object (*ghaijiah*) of the contract should be a lawful one. For example the *ghaijiah* of a *nikah* is legalization of cohabitation between a man and a woman and the legalisation of procreation.
- (5) Consideration is essential in many contracts but not in all contracts under Islamic Law.

If the contract is of property then immediate delivery of possession (*seisin*) is also essential in some contracts such as a gift.

If the contract is of the nature of gift (*hiba*) it also requires '*tangiz*', i.e., immediate operation or effect of the contract absolute and unconditional. *Tangiz* is the essential condition for the validity of a contract.

Contract belongs to the part of the Islamic Jurisprudence classed as "*muamaalat*". Contracts are of different varieties such of sale, gift, partnership, agency, bail, etc. Islamic Jurisprudence lays much stress upon the performance of contracts. Even the Holy Qur'an, the basic source of Islamic Law, itself lays down :

"And keep the covenant, certainly of the covenant it will be asked." (XVII : 45).

The Holy Qur'an orders to write down the terms of a contract and to get the documents properly witnessed :

"Believers ! when you contract a debt for a fixed term, record it in writing. (II : 282).

CLASSIFICATION OF CONTRACTS : Islamic Law classifies the contracts as under :

(1) **Contract for the transfer of property :** (a) For exchange such as sale, (b) without exchange such as *hiba*, *waqf*, will, etc.

(2) **Contract for the transfer of mere usufruct :** (a) For exchange such as bailments, carriage of goods, leases, personal and professional services ; (b) Without exchange such as 'ariat'.

(3) Contract for representation such as agency (*wakalat*).

(4) Contract for contracting and discharging obligation such as debt, pledge, surety.

(5) Contract for consortium, e.g., marriage. This has been called "*meesqqon ghaleezon*" (strong covenant) by the Holy Qur'an.

Q. 40. Define contract. What are the essentials of a valid contract in Islamic Law?

OR

Define contract. What are the ingredients of a valid contract in Islamic Law?

OR

Discuss the ingredients of a valid contract under the Islamic Civil Law?

OR

Define contract according to Islamic law. What are its essential ingredients?

Ans. (1) CONTRACT

Meaning of contract : Contract (aqd) literally means conjunction, tie, knot. In law it means conjunction of the elements of disposition, namely, proposal (*ijab*) and acceptance (*qabul*). It is a transaction which gives rise to legal effects.

Definition of Contract : Contract has been defined by article 103 of the 'Majella' as, "the obligation and engagement of two contracting parties with reference to a particular matter. It expresses combination of offer and acceptance."

(2) CONTRACT IN THE EYE OF HOLY QURAN : The Holy Quran, the basic source of Islamic law lays down.

"And keep the covenant certainly of the covenant it will be asked." (XVII. 45)

"O the believers! perform your contract (Almaida: 1)

The Holy Quran Orders to write down the terms of a contract and to get the documents properly witnessed.

"Believers! when you contract a debt for a fixed term, record it, in writing. (11: 282).

(3) CONTRACT IN THE EYE OF HOLY PROPHET (PEACE BE UPON HIM) : Prophet (peace be upon him) says, "He who has no respect for keeping promises, does not possess deen."

(4) ESSENTIAL INGREDIENTS OF A VALID CONTRACT UNDER ISLAMIC LAW : Following are the essential ingredients of a valid contract.

(i) Parties : There must be at least two parties to a contract. One person cannot make a valid contract with himself. So there must be at least two parties to make a contract.

(ii) Capacity to enter into contract : The parties must have the capacity to enter into a contract. That means to say, they must be sane, major *etc. etc.*

(iii) Offer and acceptance (Ijab and Qabul) : A contract requires that one party should make the offer (ijab) and the other party should accept (qabul) that offer. Offer and acceptance are sine-qua-non of a contract.

EXAMPLE : A offers to sell his house to B. B accepts this offer. This is a contract between A and B.

Conditions for offer and acceptance : The conditions which have been laid down by the jurists for making a valid offer and acceptance are as follows.

(1) The acceptance must be in conformity with the offer. For instance if 'A' offers his car to B for 10,000 Rupees and B accepted it for 8,000 Rupees. Then this will not be an acceptance but counter offer by B. Therefore the acceptance must conform with the offer. As any change in it make it a counter offer.

(2) The offer and acceptance must be made at one and the same session, either in fact or what the law considers as such.

(3) Acceptance should correspond to the offer. It should not be tendered after the offer has expired. If acceptance and offer has been communicated by post, contract is made at the place and time of acceptance.

(iv) **Existence of subject matter** : Existence of subject matter is necessary at the time of making a contract so that it may be transferred to other party. If the subject matter does not exist then there is no contract between the parties. Therefore the subject matter must be present at the time of making contract.

(v) **FITNESS OF THE SUBJECT MATTER** : Another essential of a valid contract like that of any other juristic act is the fitness of its subject matter (mahal); if the subject matter is not fit for the purposes, the contract relating thereto will be void altogether.

(vi) **CONSENT OF THE PARTIES** : The contract must have been made by the free consent of the parties. To constitute free consent, following conditions must be fulfilled.

(i) Both the parties must agree upon the same thing in the same sense.

(ii) Such consent should not have been caused by---

- (a) Coercion.
- (b) Unduinfluence.
- (c) Fraud
- (d) Misrepresentation.
- (e) Mistake.

(vii) **LAWFUL OBJECT** : The object of the contract must be lawful. The presumption is that every object of contract is lawful unless expressly prohibited by a provision of law.

The term object means purpose or design. There may be nothing objectionable so far as the consideration for an agreement is concerned and yet the purpose for which it was entered into may be unlawful and agreement would be void. A contract is illegal if it be in

contravention of a statute or opposed to its general policy and intent or is forbidden by law or legislature enactments.

(viii) CONSIDERATION : Consideration is essential in many contracts but not in all contracts under Islamic law.

(ix) FULFILMENT OF CONDITION : If at the time of making a contract, some conditions are also added to it, then the fulfilment of those conditions is necessary otherwise contract will become null and void. Therefore if any condition is added to the contract then the same should be fulfilled so that the contract may be effectual between the parties.

Q. 41. Define 'Milk' and what properties are included in 'Mal' ?

Are wines and pigs included in Mal and can they be owned by a Muslim ?

Ans. MILK : *Milk* are objects to which a man's wordly desires relate and with reference to which men deal with one another. The proper subject-matter of *milk* is physical objects, but the word as used by the jurists covers a wide range of ideas than those included in mere proprietary rights.

Milk is defined by *Sadrush Sharit* as the expression of connexion existing between a man and a thing which is under his absolute power and control, to the exclusion of control and disposition by other. *Taftazani* defines it as the power of exclusive control and disposition. But the word *milk* is often used for the thing itself over which the power of *malik* (owner) extends.

The things over which the juristic conception of *milk* extends may be *mal*, that is, a physical object, or what is connected therewith, namely, usufruct (*manfat*) either in the shape of produce of a physical object or of labour and services of man *muta't* that is right to conjugal society.

Mal is defined as that which can be hoarded or secured for use and enjoyment at a time of need, or that to which a man's desires incline and which men are in the habit of giving away to others and

of excluding others therefrom. This removes from the category of *mal* usufruct and right to conjugal society. The word *mal* is narrower than the English word 'property' and is properly applicable only to objects which have a perceptible existence in the outside world, that is to say, to things corporeal and tangible. Future produce or *munfa'at*, for instance, may be the subject to ownership, but is not called *mal*.

Nothing can be property unless it be such that men can derive advantage from it, that is, it must be of some use to them. Sometimes the law prohibits the use of a certain thing in any way whatever by a particular class of men; in that cause, it fails to possess any use or advantage for them. But such things would still possess the quality of property if they are of use to persons to whom the prohibition does not extend. For instance, the use of wines and pigs which are declared unclean is forbidden to a Muslim but so their use is lawful to non-Muslims, they are regarded as property, though to Muslims they have no value. On the other hand, things which are of no use to any one, such as dead bodies or human blood are not property.

So wines and pigs are property but they cannot be owned by a Muslim, as their use is prohibited by Islam.

Things have very inconsiderable value like a handful of earth or broken crumbs are not considered to be property by jurists.

Things which are for the common use of mankind and indispensable to individual and social life cannot be exclusively appropriated by one person such as air, fire, light, grass, water of seas, rivers, streams and public roads. The only condition relating to the extent and mode of use of such things is that it should not cause injury to the community.

CHAPTER 7

CRIME AND TORT

Q. 42. Briefly discuss the remedies for Torts as recognised by the Islamic Jurisprudence.

Ans. REMEDIES RECOGNISED BY ISLAMIC JURISPRUDENCE: Following are the remedies for torts as recognised by the Islamic Jurisprudence :

(1) EXTRA-JUDICIAL REMEDIES: (i) *Abatement of private nuisance* : Removal of nuisance by the injured party without the assistance of the Court. My neighbour's trees' branches overhang in my courtyard. I can cut them away.

Example of the abatement of a public nuisance: If a log of wood is lying on the public road, the obstruction to free passage can be removed by self-help.

(ii) Distress *Qurqi*, i.e., taking other's property for the discharge of a duty incumbent on that other. Cattle of other damaging my crop can be impounded by me as a pledge for the pecuniary redress of the injury caused to me.

(iii) Recaption, i.e., owner of certain goods can recover his those goods hitherto derived, by the use of requisite force.

(iv) Retaliation, i.e., reply a tort by tort.

(2) JUDICIAL REMEDIES: (i) Pecuniary Compensation in the form of damages. *Deeyat* (is plural of *deyit*) means a fine for any offence against person. Retaliation (*Qisas*) is the remedy granted by Law to the affected person on his heirs, and the injury can be compounded with offending person in the shape of money consideration (or pardoning).

(ii) Restitution, by return (*radd*) of the article usurped by other, in case the property involved is of dissimilars or delivering to the aggrieved party of a similar article *a'tal Mislih* in case the property involved was a similars. Wrong-doer is also liable for *mesne profits* obtained during the time he was in wrongful possession.

Q. 43. Discuss briefly the salient feature of Islamic Criminal Law?

Ans. (1) CRIMINAL LAW : The Criminal Law may be defined as the body of law, whether dealing with *mala prohibita* or *malainse*, the infraction of which is a crime or an offence punishable by a criminal proceeding.

(2) SALIENT FEATURES OF ISLAMIC CRIMINAL LAW : Following are the salient features of Islamic Criminal Law.

(1) It is a divine law and not a man made law. Its basis have been provided in the Holy Quran.

(2) It is calculated to save mankind from incurring the wrath of Allah by nipping evil in its bud.

(3) It upholds, defends and consolidates the positive values of Muslim society.

(4) It eradicates the crime and manages at the same time no innocent person is convicted.

(5) It classifies crimes according to the quantum of punishment, i.e. crimes of fixed punishment, crimes of retaliation and blood money and crimes of discretionary punishment.

(6) It provides many escape valves in the cases of Hadd, Qisas and Theft. Escape values in the cases of Hadd are the benefit of doubt, non availability of the prescribed quantum of evidence and mode of execution. In Qisas one of the escape values is regarding composition of the offences. In theft the accused person may return the stolen property to the owner and compound the offence, before the case comes to the Court and get the imputation remitted.

(7) It provides those foundation on which criminal responsibility of a man rest. These foundations are.

- (i) a person commits a prohibited action;
- (ii) the person exercises his free will;
- (iii) the person has the capacity to discriminate between the right and wrong.

Q. 44. What are the theories of Criminality in Islam ?

Ans. THEORY OF CRIMINALITY : The theories of criminality falls in the following four classes :--

- (1) Sociological ;
- (2) Physical or Biological ;
- (3) Psychological ;
- (4) Psychiatric.

(1) SOCIOLOGICAL : The sociologists have analysed the characteristic of the criminals. They compared the so-collected individual criminals statistical data and came to the conclusion that sociological factors are responsible in the making a man criminal. Gabriel Trade Mothers regarded crime as social phenomenon. He considered social interaction to be the process of limitation.

Dr. W.A. Bonger, the Dutch criminologist, considered to be a bye-product of capitalism because it is closely related to the economic system. Theft is the most feasible example of it because it is actually the result of the unbalanced division of money. It has been noted many times an innocent person started the commission of theft due to hunger, starvation and monetary hard pressed circumstances. Therefore, it is tussle between rich and poor.

(2) PHYSICAL AND BIOLOGICAL : After the advent of the sociological theory comes the biological theory. The social theories were overshadowed by the biological theories. The propounder of this theory believe that biological development and evolution are the responsible factors for the creation of criminals. They say that in the due course of development the criminals are under-developed human beings because they have retained certain germs of animals. Therefore, the biological factors are responsible in their commission of crime such as committing murder, assault, rioting and looting. Mr. Ceasare Lambroso, the Italian Physician tried to connect criminal behaviour with biological causes. He established the positive school of law. According to him the criminal was so low in the evolutionary scale that he retained certain animal characteristics of savagery not found in the non-criminal persons.

(3) PSYCHOLOGICAL : The psychologists are of the view that cause of crime is feeble-mindedness. This shows that there is only one cause for all crimes. This theory does not appeal to our minds.

They say that the cause of criminality, whether physical or mental, is inheritable. Henry Goddard opined that low grade mentality is the greatest cause of delinquency and crime. This low grade mentality usually begets from feeble-mindedness. A feeble-minded person is almost sure to commit crime.

(4) PSYCHIATRIC-PSYCHOANALYTIC : According to this theory several factors are responsible for criminal behaviour. William Healy opined that there are several causes for criminal potency in human being. They hold the view that the criminal acts are the result of conflicts and frustration. It is the human nature that when a child steps towards adulthood, he wants self-assertion and independence from the restrictions of family. If at this juncture his natural demands and urges are suppressed he becomes dejected and frustrated. Due to this dejection and frustration he started to find an opportunity to get rid of this state of affairs.

The Psychoanalytic expert views crime as significant in terms of a person's inner emotional urges and as a part of the process by which he seeks inner peace and self-approval.

If we compare and analyse the theories we find that all the theories have the following common factors :--

- (1) That the development of criminal behaviour is a process that has its roots in the experience of early childhood ;
- (2) That no child is a born criminal but he adopts criminal behaviour as a result of experiences that begin early in life ;
- (3) That there is no easy way to understand crime ;
- (4) That there is no quick and sure cure for crime ;
- (5) That process of eliminating crime or of reform of criminals is slow and uncertain.

The question arises as to why some people become criminals and others do not. The psychiatrist or psychoanalyst would say that those who become delinquent have emotional conflicts endangered by their early life experiences, the psychologists would say that the choice is in part accidental and in part determined by whether or not

conventional groups have absorbed the individual and thus prevented association with delinquent groups.

Islam signifies the complete subservience of the will of the individual and the collective society to the command and dictates of Allah. Human society can only flourish and thrive as long as it subjugates its will and desire to the law enunciated by Allah. These Laws can only be discerned by the selected few, namely, the Prophets and are contained in the Holy scriptures having been made known to man through direct and immediate revelation. Human history has number of examples of those who achieved the *summum bonum* of human existence by following the Laws of Allah in letter and spirit.

Islamic concept of criminality basically is that an individual is personally responsible for his acts. It is in fact due to his heinous and evil deeds that he is criminally prosecuted. According to the canons of Islam no one is born criminal but on the other hand he is born as an innocent being. Therefore, the acts of individuals are themselves responsible for making person good and bad. Qur'an says that to an individual: "We have shown the two paths and it is up to him to select any one of them." It is more clear from another verse which says "For it is (only) that which is hath earned, and against it (only) that which it hath deserved."

The above two verses clearly show that there individuals', evil designs and ulterior motives are responsible to make a person criminal. It means that the person does not inherit the criminal tendencies. It also repudiates the biological theory. It does not also support the sociological theory. According to Islam the crimes are the product of evil designs and ulterior motives. It is explicitly clear from the verse that the reward proportioned (to other evil deeds).

Islamic Law is crystal clear on the point that no one is responsible for the acts of others. It means that he has to earn good by himself. His own good deeds will pay him.

In *Surai Baqr* it is said that everybody gets every good that it earns, and it suffers every ill that it earns. The Qur'an has used the word "*Kasab*". The Muslim jurists while interpreting this term have agreed on the point that a man is neither the creator of his deeds nor his actions are predetermined. But the correct view is in-between these two. According to Islam the phenomenon of crime is explained

by the theory of "*Kasab*" which is neither creation nor a pre-determination.

If we examine all the Western theories of crimes we come to one conclusion that they make the criminal responsible to commit the crime either due to inborn characteristic of human being or the role of society. The biological theory says it is biological defects or feebleness of mind which is responsible in the commission of the offence. It means it is not the will of the person. Therefore, Western system of law are very mild in punishment. They take much care to criminals than to the crime. They consider the criminal as helpless under the circumstances. On the other hand Islam cannot tolerate crimes. It wants to eradicate all such evils from the society. The Islamic system cannot tolerate the prevalence of crimes. Therefore, the punishment is very deterrent so that the crime cannot be repeated. We have already noticed the observation of Warren Hastings on the Islamic System of punishment prevalent in India during those days.

Q. 45. What are different theories of punishment in Islam?

Ans. (1) PUNISHMENTS : Punishments are called *Uqahat* (*aqb* means a thing, following another thing). It means violation of law is immediately followed by punishment.

(2) OBJECT OF PUNISHMENT : The object of punishment is the prevention of crime and every punishment is intended to have a double effect *viz.* to prevent the person has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes. The main object of awarding punishments for offences is to create such atmosphere which may become a deterrence for the people who have propensities towards crime and thereby prevention of offences so that the society in which all the members have to live may not feel suffocated disturbed, unsafe and prone to unhealthy environment.

(3) THEORIES OF PUNISHMENT IN ISLAM : The four different theories of punishment are the following:-

(i) Ibratnak: According to this theory the punishment is awarded to deter people from committing the crime. Emotion of fear plays a vital role in man's life. The people fear to commit the offence

because it will render them to suffer. The fear of punishment puts a check not only on criminal from committing further crime but also on all other evil minded.

It is said in Quran in relation to retributive punishment:

"As to be thief male or female, cutt off his or her hands, a meed for which they have earned, an exemplary punishment from Allah;" (Al-Maida : 38)

(ii) **Intaqmi** : This theory is based on the principle of an eye for eye and tooth for tooth the offender should be punished according to the nature of injury caused by him to the victim. In other words punishment should be in proportion to the injury caused by the accused. This theory does not look to the motive but to intention in committing crime.

It is said in Quran in relation to retributive punishment:

"Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wound equal for equal. (Al. Maida: 45)

(iii) **Insadadi** : This theory aims at preventing the crime by disabling the criminal. In order to prevent the repetition of the crime the offenders are punished with death, imprisonment for life or transportation of life. For example a murder is committed by A, and he is punished. Here A is punished not for having committed the murder, but in order that no further murder be committed.

(vi) **Islahi**: The object of punishment according to this theory should be to reform the criminals. The crime is mental disease which is caused by different anti-social elements. Therefore, there should be mental cure of the criminals instead of awarding them severe punishment. Much truth lies in the statement that to open a school is to close a prison. If persons of criminal character are so educated and trained that they are made competent to carry on well in society, there will be little or not at possibility of any crime being committed by them. The punishment should therefore be curative or corrective because no body can cure by killing.

Q. 46. What is the object of punishment in Islam. What are different kinds of punishment in Islamic Law?

Ans. (1) MEANINGS OF PUNISHMENT : Punishment literally means a thing following another thing. In legal terminology punishment means any fine, penalty or confinement inflicted upon a

person by the authority of the law and the judgment and sentence of a Court for some crime or offence committed by him or for his omission of a duty enjoined by law.

(2) OBJECTS OF PUNISHMENT : The objects of punishment in Islam are as follows.

- (i) To obstruct people from violating those acts for which hudood has been fixed by God.
- (ii) To maintain the society on its centre, so that matter may be solved by way of balance and moderation and not by extremism.
- (iii) To satisfy the sense of retribution which is naturally stirred up when a person is wronged.
- (iv) To prevent a wrongdoer from committing a wrong second time.
- (v) To make offender an example to other person who have criminal tendencies.
- (vi) To reform offender by realising his offence.
- (vii) To fulfil the requirements of Islamic system of justice.

(3) KINDS OF PUNISHMENTS : Punishments in Islam are of three kinds.

- (i) Hadd (ii) Tazir (iii) Qisas

(i) HADD : Hadd literally means "Obstruction" prohibiting from entering. It is thus that 'haddad' means a person who prevents from entering i.e. gate keeper. It also means limit. In its legal sense, with which we are here concurred the term hadd means the prescribed punishment as ordained by Allah through the Holy Quran or as given by the Holy Prophet (Peace be upon him). Such punishments relate to:

(a) Theft : The Quran says as to the punishment of the offence of theft;

"And (as for) the male thief and the female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they committed, a punishment by way of example from Allah."

(Al. Maidah; 38)

(b) **Haraabah** : Quran says as to the punishment of the offence of haraabah:

"The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed, crucified or their hands and their feet be cut off opposite sides or be exiled from the land." (Al-Maidah : 33)

(c) **Zina**: Quran says as to the punishment of the offence of Zina:

"The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes.

(Al-Noor: 2)

(d) **Qazf** : The Holy Quran says as to the punishment of the offence of Qazf:

"And those who accuse chaste women and produce not four witnesses, flog them with eighty stripes and reject their testimony. They indeed are the Fasiqun (Liars, disobedient of Allah).

(Al-Noor : 4)

(e) **Drinking** : The Holy Quran says as to drinking:-

"Intoxicants (all kinds of alcoholic drinks) and gambling and Al, Ansab and Al-Azlam (arrows for seeking luck or decision) are an abomination of shaitan's (Satan) handi work. So avoid strictly all that (abomination) in order that you may be successful. (Al-Maidah:90)

The Book of God has not prescribed any punishment but the punishment sanctioned is 40 stripes and in some cases 80 stripes.

(f) **Apostasy** : The Holy Quran says as to apostasy:

"And whosoever of you turns back from his religion and dies as a disbeliever, then his deed will be lost in this life and in the hereafter, and they will be dwellers of the Fire."

(Al. Baqarah; 217)

(g) **Treason** : In the list of Hadd, treason is last Hadd. There is punishment of murder for this offence.

Quran say as to treason:

"And if two parties of believers fall to fighting, then make peace between them. And, if, one party of them doeth wrong to the other, fight that which wrong till in return unto the Ordinance of Allah."

(Al. Hujurat: 9)

(ii) **TAZIR** : Crimes which are not punishable with punishments (hadd) are classified under the Head of Tazir: Crime punishable as such have no fixed or prescribed punishment. In this category of crimes may fall murder, misappropriation, forgery and what not and the punishments may be by way of ordering death, flogging, imprisonment, fine, etc.

Tazir may further be discussed under the following headings:-

(a) **Definition of Tazir** : Tazir, in its primitive sense, means prohibition and also instruction:

In law it signifies an infliction undetermined in its degree by the law on account of the right either of God, or of the individual; and the occasion of it is any offence for which Hadd has not been appointed whether the offence consists in word or deed.

(b) **Tazir is ordained by law** : Tazir is ordained by law, the institution of it being established on the authority of the Quran where God enjoins men to chastise their wives, for the purpose of correction and amendment, and the same also occurs in the traditions. It is moreover recorded that the Prophet chastised a person who had called another perjured; and all the companions agree concerning this. Reason and analogy moreover both evince that chastisement ought to be inflicted for acts of an offensive nature, in such a manner that men may not become habituated to the commission of such acts; for if they were, they might by degrees be led into the perpetration of others more atrocious.

(c) **Objects of Tazir** : The objects of Tazir are the correction of offender, the prevention of the recurrence of the crime and it is left to discretion of the Magistrate to determine in view of the circumstances of each case, the sentence by which the objects of law would be best achieved. He is to take into account the nature of

offence and circumstances under which it was committed, the previous character and the position in life of the offender and so on. For example for sodomy or other unnatural carnal offences no punishment is fixed. According to Imam Abu Hanifa the offender should be detained in prison till he repents. Similarly for counterfeit coins Tazir shall be applied.

(d) Offences of Tazir : Offences of Tazir are innumerable. However, they are of two kinds.

(i) The acts or the omission in which some Divine provisions are violated. For instance, the practice of usury, misappropriation of pledge, bribery, abuses *etc.*

(ii) The violation of the rules, regulations and order of the Government acting as sub-legislative authority. Such rules and regulations cannot be arbitrary. They must be promulgated in the larger interests of the society. Not only that they should not contravene any Divine provisions but also they should be furthering and executing some Divine injunctions. The legislative powers of Government are limited to this extent.

(e) Infliction of tazir : Tazir may be inflicted by imposition of fine, scourging imprisonment, *etc.* It is the punishment which is left to the discretion of the Qazi or judge.

(f) State power of pardon : In the cases of Tazir, the state has got the pardoning powers. In these crimes right of punishment has been delegated by the Shariah to the state. The state has got discretion to alter the quantum of punishment to the minimum extent of mere admonition.

(iii) QISAS : Qisas literally means to go back and, legally, it is an act which follows another act. It is allowed in case of wilful murder, destruction of life or limb, capable or definite ascertainment. It calls for similar injury to the wrongdoer.

Quran explains the concept of Qisas in these words.

"O you who believe, Al-Qisas (the law of Equality in punishment) is prescribed for you in case of murder. The free for the free, the slave for the slave and the female for female. But if the killer is forgiven by the brother (or the relatives) of the killed against blood money, then adhering to it with fairness and payment of the blood money to the heir should be made in fairness. This is an all

eviation and a mercy from your lord. So after this whoever transgresses the limits (i.e.) kills the killer after taking the bloodmoney), he shall have a painful torment. (**Al-Baqarah! 178**)

Another form of Qisas is Itlaf-udu or Itlaf-Salahit-udu. In such case the offender could be given punishment to such an extent which he would have caused to the mutzarar. The injunction of Quran is this.

"Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." (**Al-Maidah 45**)

It is clear from the above verses of Holy Quran that retaliation is a right of the person injured or of his heirs. They can compound with offender by accepting money or pardon him. But nowadays this remedy has theoretical value only as it is not in vogue because the act of retaliation has now become the exclusive right of the State.

Q. 47. What crimes are regarded as Hudood Crimes. Discuss in detail?

OR

Define and discuss all the seven crimes of Hudood in detail?

OR

What are the crimes of Hudood in Islamic law? Discuss.

OR

Discuss all the Hudood crimes in detail?

Ans. (1) MEANINGS OF HADD

(i) **Literal Meanings** : The literal meaning of Hadd is measure or limit.

(ii) **Legal Meanings** : In legal terminology it means that punishment, the limit of which have been defined and fixed in the Quran and Hadith. It relates to those Crimes in which the right accrues to God alone without any right accruing to humanity.

(2) CRIMES OF HUDOOD : The following crimes are the crimes of Hudood.

(a) Zina (b) Qazaf (c) Drinking (d) Theft (e) Apostasy (f) Harrah (g) Sedition

(a) ZINA : When a sane adult man/ woman, not married together nor suspecting to have been married together, indulge in sexual intercourse, such man/woman committ Zina.

(i) Proof of Zina : Proof of Zina is by two ways.

(a) Bayyinat and

(b) Confession

(a) Bayyinat : By Bayyinat is meant testimony of four competent witnesses.

(b) Confession : By confession is meant the four times confession by accused himself.

(ii) Punishment of Zina : (i) If convict is Mohsan, then he shall be stoned to death at a public place; or

(ii) If convict is not a Mohsan, then he shall be punished with whipping numbering one hundred stripes.

(b) QAZF : When an adult person, intentionally and unequivocally makes an imputation of Zina against any person who is Muslim and capable of performing sexual intercourse such person committ the offence of Qazf.

(i) Proof of Qazf : The offence is proved when the offender himself confesses his guilt or when at least two Muslim adult male witnesses give direct evidence to such effect.

(ii) Punishment of Qazf : The person guilty of Qazf shall be punished with whipping numbering 80 lashes and his evidence shall not be admissible in any Court of law.

(c) DRINKING : Drinking means intentionally (without Ikrah or itizar) taking any intoxicant by any means whatsoever even though intoxication may not be caused.

Ikrah : means putting a fear of injury to person, property, or honour of the person concerned or any person such as for example ones wife or children.

Itizar : means putting a person in such situation where he feels an apprehension of death due to extreme hunger thirst or illness.

(i) **Proof of Drinking** : Drinking is proved when the accused confesses to take intoxicating liquor by mouth or when at least two adult male Muslim witnesses give evidence that accused have committed the offence of drinking.

(ii) **Punishment of Drinking** : The person guilty of drinking shall be punished with whipping numbering 80 stripes.

(d) **THEFT** : Theft signifies the taking away the property of another in a secret manner when such property is in safe custody (Hirz) i.e., when the effects are in supposed security from the hands of other people and where the value is not less than ten dirham and effects taken the undoubted property of some other than of him who takes them.

(i) **Proof of Theft** : Theft is proved when the accused pleads guilty or when at least two Muslim adult witnesses give evidence as eye-witness of the occurrence and the Court is satisfied after tazkiya-al-shuhud that they are truthful witnesses and abstain from major sins.

(ii) **Punishment of Theft** : The punishment for theft shall be as follows:

- (i) when the offence is committed for the first time--amputation of right hand from the joint of wrist.
- (ii) when committed for second time--amputation of left foot up to ankle.
- (iii) When committed for third time or subsequently --imprisonment for life i.e. till death.

(e) **APOSTASY** : Apostasy means turning from Islam after being a Muslim.

In Islam the punishment prescribed for the act of apostasy is death. Muslim jurists hold the view that before penalizing an apostate it is necessary to give him an option of three days to re-embrace the faith.

According to Hanafi school of thought an apostate woman and a hermaphrodite would not be condemned to death but imprisoned and even physically tortured.

(f) **HARAABAH** : When a person or persons, armed, or not armed, make a show of force for taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt such person committ the offence of Harabaah.

(i) **Proof of Haraabah** : Haraabah is proved when the accused pleads guilty or when at least two Muslim adult witnesses give evidence as eye-witness of the occurence.

Punishment of Haraabah : The punishment for Haraabah shall be as follows:

(i) When the offence is committed for the first time --- amputation of the right hand and left foot.

(ii) When committed for second time--- amputation of the left hand and right foot.

(g) **SEDITION** : Sedition to Islamic state is an offence and also comes under the crime of Hudood. There is a punishment fixed for this offence in Islam.

Q. 48. Discuss Hadd and Tazir as punishments in Islam?

OR

Discuss the difference between 'Hadd' and 'Tazir'?

OR

Define and distinguish between Hadd and Tazir?

Ans. (1) **HADD** : The literal meaning of Hadd is measure or limit. In legal terminology it means that punishment the limit of which have been defined and fixed in the Quran and Hadith. It relates to those crimes in which the right accrues to God alone, without any right accruing to humanity. The Islamic Sharaih has fixed Hadd on following crimes.

(a) Zina (b) Qazf (c) Theft (d) Drinking.

(a) **Zina** : Hadd of Zina shall be proved in that case only when four adult sane, free and Muslim male will give evidence to this effect or when the accused will confess his offence four times.

The punishment for Zina shall be as follows.

(i) In case of Mohsan---Rajam or Stonned to death.

(ii) In case of Non-Mohsan--100 stripes.

(b) **Qazf** : When a person accuses on other person of committing unlawful sexual intercourse and do not produce the four competent witnesses in support of his accusation then Shariah has fixed the Hadd of Qazf for him, which is 80 stripes for a free man and 40 stripes for a slave.

(c) **Theft** : Hadd of theft is established only when the stolen property is of the value of Nisab or more. According to Hanafis the nisab of theft is 10 Dirham, according to Imam Shafi nisab of theft is 1/4th Dinar and according to Imam Malik it is three Dirham Imam Ahmad also declares three Dirham as Nisab of theft. The Hadd is not appointed when the stolen property is less than the value of nisab of theft. It is also a condition to appoint Hadd that the property must have been stolen from safe custody (Hirz). Person committed theft liable to Hadd only when he confesses his offence or when two Muslim adult male witnesses give evidence as eye witness and the Court is satisfied after Tazkiy-al-Shuhood that they are truthful witness and abstain from Major Sins. The punishment for theft in case of committed first time is amputation of right hand from the joint of wrist and in case of committed second time is amputation of left hand up to ankle and in case of committed third time is imprisonment for life.

(d) **Drinking** : Hadd of Drinking wine is enforced when two competent witnesses give evidence to this effect or when accuse confesses his guilt himself. Hadd of drinking wine is fixed as 80 stripes.

(2) **TAZIR** : Tazir in its primitive sense, means prohibitions and also instruction, in law it signifies an infliction undetermined in its degree by the law, on account of the right either of God or of the individual and the occasion of it is any offence for which Hadd has not been appointed; whether that offence consists in word or deed.

It may be inflicted for offences against human life, property, public peace and tranquility, decency, morals, religion and so on. In fact the entire criminal law of the Muslim is based on the principle of Tazir.

The nature of the sentence to be inflicted by way of Tazir for particular kinds of offences may be regulated by the Head of the State who has absolute discretion in the matter so by our legislative Assemblies.

(a) Objects of tazir : The objects of Tazir are the correction of the offender, the prevention of recurrence of the crime and it is left to the discretion of the Magistrate to determine in view of the circumstances of each case, the sentence by which the objects of the law would be best achieved. He is to take in account the nature of the offence and the circumstances under which it was committed, the previous character and the position. For example for sodomy or other unnatural and carnal offences no punishment is fixed. According to Imam Abu Hanifa, the offender should be detained in prison till he repents. Plainly speaking the main source of punishment is Tazir, because in the following cases Hadd' cannot be applied.

(1) When due to lack of prescribed evidence, it becomes doubtful whether hadd applies, e.g., in case of instead of four eye witnesses only two eye witnesses have to be relied although the offender himself had no doubt about application of hadd.

(2) When the offender honestly did not know that what he was doing constituted an offence. The state of mind of the accused is relevant consideration.

It was said that under Umar's Caliphate his son was accused of drinking the noble and learned Caliph awarded his son eighty stripes by analogy because under of influence of intoxication one makes accusation. This was a case of Tazir.

(3) DIFFERENCE BETWEEN HADD AND TAZIR.

HADD	TAZIR
(i) The literal meanings of Hadd is measure or limit.	That literal meanings of Tazir is prohibition or instruction
(ii) Hadd is a fixed punishment.	Tazir is non-fixed punishment. It depend on the discretion of Qazi.
(iii) Hadd becomes Saaqit in case of doubt.	Tazir does not become Saaqit in case of doubt.

(iv) Hadd is not inflicted on child.

Tazir is inflicted also on child.

(v) In Hadd Crimes, conditions for giving evidence are very strict.

In Tazir Crimes, conditions for giving evidence are not so strict.

(vi) In Hadd Crimes state has no power to pardon the offender.

In Tazir Crimes, State has the power to pardon the offender.

(vii) Hadd is inflicted for offences against Zina, Qazf, Theft, Drinking Haraabah and Apostasy.

Tazir is inflicted in respect of the acts such as abusing others, trespass and House trespass, forgery, gambling, acts by habitual offenders, causing nuisance to others, kidnapping, molesting women etc., etc.

(viii) In Hadd Crimes, Qazi cannot exercise his discretion.

In Tazir Crimes, Qazi or Court can exercise his discretion.

(ix) Punishment by way of Hadd are; Death by stoning for whoredom, amputation of limb for theft, eighty stripes for drunkenness, slander, imputation of chastity.

Punishment by way of Tazir are Fine, scourging, imprisonment, transformation and even capital punishment.

(x) In Hadd crimes, punishment can neither be increased nor be decreased by Qazi.

In Tazir crimes, punishment can be increased or decreased.

Q. 49. Define and discuss the difference between Qisas and Diyat in Islamic Law? Discuss.

Ans. QISAS AND DIYAT

(1) **QISAS** : Qisas literally means to go back and legally, it is an act which follows another act. It is allowed in case of wilful

murder or wilful destruction of life or limb, capable of definite ascertainment. It calls for similar injury to the wrong doer.

Quran Says :

O you who believe! Al Qisas (The law of equality in punishment) is prescribed for you in case of murder. The free for the free, the slave for the Slave and the female for female. But if the killer is forgiven by the brother (or the relatives) of the killed against blood money, then adhering to it with fairness and payment of the blood money to the heir should be made in fairness. This is an alleviation and a mercy from your lord. So after this whoever transgresses the limits, he shall have a painful torment. (Al Baqrah 178)

In another place Quran says:

"Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal." (Al-Maidah 45)

It is clear from the above verses of Holy Quran that retaliation is a right of the person injured or of his heirs. They can compound with offender by accepting money or pardon him. But now-adays the above said remedy has the theoretical value only as it is not in vogue because the act of retaliation has now become the exclusive right of the State.

(2) DIYAT : Diyat means the compensation granted to the heirs of the victim by the offender.

It is a compensation fixed by Law/Shariat payable to the heir of the victim by the offender. This blood money is a substitutory punishment for Qisas is the form of monetary compensation. It is a fixed punishment implementable as the right of the individual.

It is payable on the commission of Qatl-i-Shibb-i-Amd, Qatl-i-Khata, Qatl-i-Khata by rash or negligent driving and Qatl-i-bis-Sabab.

(a) FORMS OF DIYAT : In Qatl-i-Shibb-i-Amd, Diyat mugh-allagza is payable, whereas in Qatl-i-Khata, Qatal-i-Khata by rash or negligent driving and Qatl-i-bis-Sabab A'am Diyat is payable.

Diyat-e-Mughallaza : Diyat-Mughallaza is paid only in the form of camels. According to Sheikkhan, Diyat Mughallaza is one hundred camels. Among these she camels, 25 will be one year old, twenty five 2 years old, twenty five three years old and twenty five four years old. Diyat Mughallaza is also one hundred camels according to Imam Muhammad, Imam Shafi, and Imam Ahmad.

A'am Diyat : There are different forms of A'am Diyat. This can be paid in the form of camels or in any other form.

- (i) In first case, hundred camels should be paid.
- (ii) In second case, one thousand dinar should be paid from Gold.
- (iii) In third case, according to Ahnaaf ten thousand dirham, and according to Malik and Imam Shaffi twelve thousands Dirham should be paid from the Silver.

Diyat of Unbelievers : If a christain or a jew be killed, his blood wit is half that of a free Muslim. A Muslim may not be put the death for an unbeliever unless he have killed him treaherosly. The bloodwit of a Magian is 800 Dirhams.

Exemption from Diyat : Women and children are not liable to pay diyat.

DIFFERENCE BETWEEN QISAS AND DIYAT :

QISAS	DIYAT
(i) Qisas is a bodily compensation.	Diyat is financial compensation.
(ii) Qisas is paid on Qatl-i-amd only.	Diyat is paid on Qatl-i-Shibh-amd, Qatl-i-Khata, and Qatl-bis-Sabab.
(iii) Qisas is taken from the offender.	Diyat is taken from Aaqila.
(iv) In Qisas, social status of the offender is not considered.	In Diyat, social status of both oppressor and oppressee is considered.

CHAPTER 8

PROCEDURE AND EVIDENCE

Q. 50. What are the Salient feature of Islamic Law of Evidence?

Ans. (1) MEANINGS OF EVIDENCE : The term Evidence means the facts, testimony or documents which may be legally received in order to prove or disprove a fact under inquiry."

(2) DEFINITION OF EVIDENCE : "Evidence may be defined as any fact which possesses probative force."

(a) According to Evidence Act : "Evidence means and includes all statement which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry and all documents produce for the inspection of Court."

(3) QURANIC VERSES IN SUPPORT OF EVIDENCE: Following verses of Holy Quran may be presented in support of concept of evidence.

- (i) Hide not testimony. He who hides it verily his heart is sinful." (Al Baqra 283)
- (ii) "And who is more unjust than he who conceals the testimony he has from Allah" (Al Baqra 140).
- (iii) "Never try to mix-up wrong with right and do not conceal the truth intentionally." (Al Baqra 42)

(4) SALIENT FEATURES OF ISLAMIC LAW OF EVIDENCE : Salient features of Islamic Law of Evidence are the following:

(i) Evidence for God : Testimony is kept upright for God.

(ii) Inducement to give true evidence : Muslim has been induced to give true evidence. As Holy Quran ordains "Never try to mix up wrong with right and do not conceal the truth intentionally."

(iii) Qualifications : There have been fixed some qualifications for the competency of witness. Those qualification are as follows.

(i) Muslim (ii) Major (iii) Sane (iv) Having Eye sight (v) Capacity to speak (vi) Male etc., etc. A person having these qualities, is considered a competent Witness.

(iv) Nisab-Shahadat : For different nature of cases, Nisab of shahadat has been fixed. That means to say, number of witnesses has been fixed owing to different nature of cases. These number has been fixed in this manner.

- (i) In case of Zina, four male witnesses.
- (ii) In case of Haddood and Qisas, two male Witnesses.
- (iii) In case of financial and non-financial matters, two male witnesses or one male and two female witnesses.
- (iv) In case of women related matters, two female witnesses.

(v) Determination of occasions : Occasions for giving Evidence has been determined. That means to say, on which occasion evidence should be given, has also been determined.

(vi) Izhar-e-Shahadat : Izhar-e-Shahdat has been declared necessary. If any body has seen some occurrence he should have express it for the right thing.

(vii) Tazkyat-ush-Shahood : Principle of Tazkyat-ush-Shahood has been adopted. Under this principle an inquiry as to the background and character of witnesses has been made by the Court.

(viii) Evidence of testimony : Principle of evidence of testimony (Shahdat-ala-Shahadat) has been introduced. It may sometimes happen that the persons who witnessed a transaction may not be available owing to their being dead or being at such a great distance that it is not practicable to produce them. Then evidence may be received of a person who heard them state that they witnessed the transaction. This is called evidence of testimony.

Q. 51. Write the importance and kinds of evidence under the Islamic law. Who can testify and who cannot?

Ans. (1) MEANINGS OF EVIDENCE : The term evidence, means the facts, testimony or documents which may be legally received in order to prove or disprove a fact under inquiry."

(2) DEFINITION OF EVIDENCE : Evidence may be defined as any fact which possesses probative force."

(a) According to Evidence Act : Evidence means and includes all statement which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry and all documents produce for the inspection of Court."

(3) IMPORTANCE OF EVIDENCE : Following verses of Holy Quran show the importance of Evidence. (Testimony).

- (i) "Hide not testimony. He who hides it, verily his heart is sinful." (Al Baqra! 283)
- (ii) "And if you give your word, do justice there unto, even though it be (against) a kinsman." (Al Anam! 152)
- (iii) "Never try to mix up wrong with right and do not conceal the truth intentionally." (Al-Baqara! 42)
- (iv) "And who is more unjust than he who conceals the testimony he has from Allah." (Al-Baqara. 140)
- (v) "And the witness must not refuse when they are summoned." (Al Baqara 282).

(4) KINDS OF EVIDENCE : Kinds of evidence have been fixed. These kinds of evidence are as follows:

- (i) Universal Evidence.
- (ii) Documentary Evidence.
- (iii) Direct Evidence.
- (iv) Circumstantial Evidence.
- (v) Hearsay evidence.
- (vi) Evidence of testimony.

(i) **Universal Evidence** : The highest kind of oral testimony having regard to its value as a proof is known as Universal testimony. Such proof consists of information given by a such a large body of men that one reason cannot conceive that they would combine in a falsehood or agree in error. When testimony is not of this notorious and universal character it is isolated is or single testimony.

(ii) **Documentary Evidence** : Sometimes documents are accepted as a substitute for oral testimony. But the Court is not to act on a sealed deed or any other document unless it is free from the suspicion of being forged and is such as is customary for people to enter their transactions therein. For instance, official documents and the records of a Court of Justice can be accepted. Books of account kept in the course of business and documents executed in the presence of two witnesses are also admitted in evidence.

(iii) **Direct evidence** : Direct evidence is the testimony of a witness relating to the precise point in issue or the principal fact. It is evidence of fact actually in issue or evidence of a fact preserved by a witness with his own senses. Thus the testimony of 'A' that he saw B commit the murder, constitutes direct evidence.

(iv) **Circumstantial evidence** : Besides human testimony, facts and circumstances (Qarinat) may also be relied upon as a proof. But circumstantial evidence will only be acted upon if it is of a conclusive nature. For instance if a person is coming out from an unoccupied house in fear and anxiety with a knife stained with blood in his hand and in the house a dead body is found with its throat cut, these facts will be regarded as a proof that the person who was seen coming out murdered him.

(v) **Hearsay evidence** : Hearsay evidence is evidence of a facts not actually perceived by a witness with his own senses but proved by him to have been stated by another person. Subject to certain exceptions, the law rejects hearsay evidence altogether.

(vi) **Evidence of testimony** : It may sometimes happen that the persons who witnessed a transaction may not be available owing to their being dead or being at such a great distance that it is

not practicable to proceed them. The evidence may be received of a person who heard them state that they witnessed the transaction. This is called evidence of testimony (Shahadut ala. Shahadut) and is allowed by juristic equity because of necessity.

(5) WHO MAY TESTIFY AND WHO MAY NOT?

(i) The following can testify :

- (i) Muslim.
- (ii) Sane
- (iii) Person possessing eye sight.
- (iv) Person having capacity to speak.
- (v) Person free from bias and prejudice.
- (vi) Person who are man of character.
- (vii) Person not convicted of giving false evidence.
- (viii) Person not convicted of Qazaf.
- (ix) Person able to understand questions put to them.

(ii) The following may not testify.

- (i) Person unable to understand questions.
- (ii) Lunatic.
- (iii) Person convicted of giving false evidence.
- (iv) Person convicted of Qazaf.
- (v) Person having relation or interest with the party in the litigation
- (vi) Non-Muslim.
- (vii) Female.
- (viii) Offender of Major Sins.
- (x) Person who makes fun to religion.

Q. 52. What are the qualifications of a competent Witness? Discuss the status of Women as a Witness?

OR

Who is a competent Witness under Islamic Law?

OR

Discuss the qualifications of a competent Witness under the Islamic Law of Evidence?

Ans. (1) MEANINGS OF WITNESS : Witness means a person who testifies on oath in a judicial proceedings of the facts within his knowledge.

(2) DEFINITION OF WITNESS : "Any person, adult and sane, not subject to sovereign or diplomatic immunity (except the parties to litigation) who divulges facts of the event happened and establishes evidence before Court is known as witness.

(3) COMPETENT WITNESS : "A person is a competent witness provided that he should have capacity to understand and rationally answers the question put to him."

(4) IMPORTANCE OF WITNESS : Following verses clearly show that Holy Quran has greatly emphasised on the Importance of evidence of witnesses.

"O ye who Believes, be steadfast for Allah in equity and let not hatred of any people seduce you that you dealt not justly." (Al-Maida, 8)

"And the witnesses must not refuse when they are summoned." (Al. Baqara. 282)

"O ye who believe! Be you staunch in justice, witnesses for Allah even though it be against yourselves.

(5) QUALIFICATIONS OF A COMPETENT WITNESS : Under Islamic Law, following qualifications must be present in a Witness.

(i) Muslim : A witness should be Muslim, As evidence of non-Muslim against a Muslim is not admitted.

(ii) Sane : A witness should be sane. As a insane incompetent to give evidence. So sanity is also a qualification, the

fulfilment of which is also necessary for a person who is going to give evidence.

(iii) **Major** : A witness should be major. As a minor has not the capacity to understand the incident, therefore in order to be competent as witness one must be major.

(iv) **Eye sight** : The most important qualification for a witness is that he must possess eye sight. In case of facts capable of being seen.

(v) **Capacity to speak** : A witness should have the capacity to speak, that means to say, he must not be dumb but he must be able to speak.

(vi) **Speak truth** : A witness must be a person who speak truth and go with the truth. As evidence of a liar, is not admissible.

(vii) **Free from bias and prejudice** : It is necessary that witness must be a person; free from bias and prejudice hence; testimony is not admitted of father in favour of the son and *vice versa*, of slave in favour of his master, of parties in support of their own case, of person who bears a grudge against the opposite party, of a non-muslim against a muslim.

(viii) **Man of character** : The witness should be a man of character; there should a good reputation about his conduct. He should not be a gambler or drunkard. The evidence of a Fasiq is also not admissible.

(ix) **Man of mature understanding** : The witness must be a man of mature understanding and have power of perception.

(x) **Not convicted by a Court of law** : A witness must not be convicted of perjury or giving false evidence by a Court of law.

EXCEPTION : A person convicted may be competent to give evidence if he thereafter repented and mended his ways.

(xi) **Male** : A witness should be male. (This qualification is necessary in cases of Hudood).

(xi) **Able to understand question** : A witness must be able to understand question put to him. Reasons for inability of understanding questions may be tender age, extreme old age, disease *etc.*

(6) DISQUALIFICATION FOR BEING A COMPETENT WITNESS : Following are some disqualifications for being a Witness.

(i) Inability to understand Questions : A witness who is unable to understand questions put to him is disqualified for being a competent witness. This inability of understanding questions, may be:

- (i) tender age;
- (ii) extreme oldage;
- (iii) disease of mind or body; or
- (iv) any other such cause.

(ii) Lunatic Person : A person who is lunatic is incompetent to give evidence.

EXCEPTION : A lunatic, if capable of understanding the questions put to him and giving rational answers, is a competent witness.

(iii) Person giving false evidence : A person convicted of giving false evidence is also disqualified as a witness.

(iv) Person convicted of Qazaf : A person who is convicted of Qazaf is incompetent to give evidence.

EXCEPTION : If a person, who is convicted of Qazaf, has thereafter repented and mended his conduct, He may be considered competent to give evidence.

(v) Females : Females are incompetent to give evidence in Hudood cases.

(vi) Interest or Relationship : Where a person, who is appearing before Court of law as witness, has an interest in the litigation or has any relation with the party to litigation, he as a witness is not qualified to give witness. As owing to such an interest or relation he may become bias while recording his evidence.

(vii) Person telling A lie : Such a person is also incompetent to give evidence, who is known for his telling a lie.

Q. 53. Discuss in detail the testimony of women under the Islamic Law?

OR

Discuss the Status of women as competent witness under Islamic Law of evidence?

OR

Can a woman be competent witness?

Ans. TESTIMONY OF WOMEN : In Islamic Law, although the evidence of women have been accepted but it has not been given as importance as given to the evidence of man. The reason for this is that the women are naturally found defective in the matter of wisdom. Under Islamic Law, the evidence of women can be stated with reference to the following.

- (i) Evidence of women in cases of Hudood.
- (ii) Evidence of women in financial and non-financial affairs.
- (iii) Evidence of women in women related matters.

(i) EVIDENCE OF WOMEN IN HUDDOD CASES :
The evidence of women is not admissible in the cases of hudood. The reason for this is that they have been considered incompetent to give evidence in those cases due to their weak having character.

The four Sunni School of thought also formed this opinion, that women are incompetent to give evidence in those cases where rights of Allah are involved, i.e. Hadood.

(ii) EVIDENCE OF WOMEN IN FINANCIAL AND NON-FINANCIAL MATTERS.

(a) Financial matters : The evidence of women have been accepted in financial matters in the Islamic Law. The Imams of Four Sunni School of thought also accept such evidence. According to them, women can give evidence in these matters.

The financial matters in which evidence of women have been accepted are Ijara, Kafala, Khiar, Shufa, and Bai etc.

There have been found a difference of opinion as to the evidence of women in non-financial matters. In this connection, the evidence of woman has been accepted by Ahanaf. But according to Shafi and Malik such evidence is not admissible. According to them,

as in the cases of Haddood the evidence of male is necessary instead of female, in the same way in non-financial matters, witness should be male instead of female. As far as the Imam Hanabal view is concerned in this respect, there have been found both types of arguments.

(iii) EVIDENCE OF WOMEN IN WOMEN RELATED MATTERS : The evidence of women have been accepted in matters related to women under the Islamic Law. This is so because if it is to find whether a woman is pregnant or not then only a woman can give evidence in this respect or if it is to find that whether a child was born alive or not after birth then this fact can also be known through the evidence of women.

In the same way, a woman can also give evidence as regards the secret physical defects of a women.

Though the Imams of four Sunni School of thoughts are agreed about the evidence of women in women related matters but there have been found a difference of opinion between them as to their strength. Imam Abu Hanifa and Imam Malik's view in this connection is that the evidence of two women is Motabar in women related matters. But if two women are not available then the evidence of a free woman will be sufficient in this regard. Imam Shafi holds the different view from Imam Abu Hanifa and Imam Ahmad Bin Hanabal. According to him, the evidence of four women is necessary in matters related to women. Whereas Imam Malik holds the same view as Imam Abu Hanifa and Imam Hanabal hold.

Necessary explanation regarding evidence of women : In Islamic Law, evidence of two women have been considered equal to one man. This so because that women are naturally Naqis-ul-Aqal and forgetfulness is also dominated on them, so if one woman forget, the other one remember her.

In matters relating to rights, the evidence of two men or one man and two women has been accepted. But this is only in case that where two men are not available. Therefore if two men are available, then they shall be made the witness and if two are not available then one man and two women shall be made witness. But in case of matters related to women, only women shall be eligible to give evidence.

CHAPTER 9

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Q. 54. Discuss main features of Constitutional and Administrative Law of an Islamic State.

Ans. CONSTITUTIONAL LAW : The Islamic Law seems to contemplate that there should be a single Islamic State, and that the Caliph, as its chief representative should administer the executive affairs of the community living within such State through his delegates and governors.

The conception of a State in the Islamic system is, that of a Commonwealth of all the Muslims living as one community under the guidance and discretion of a supreme executive had called the Imam or the Caliph. The responsibility of administration rests with the Imam, but for the convenience of administration he may delegate his powers to different persons. He may for instance, appoint Ministers to whom he may delegate practically all his powers and faculties or only particular powers, or he may appoint them merely for the purposes of consultation and for executing orders. Similarly he may appoint a person as Governor of a particular country with such powers as may be necessary.

He may also delegate the exercise of his authority in the various departments of administration to different officers, such as the command of the army, administration of justice, revenue, police and the like. But the Imam has not legislative powers to all though he may interpret the law if he happens to be a jurist, by his interpretation will have no special authority by reason of his position as Imam. He is bound by the law, and by the decrees and orders of the Court like any other citizen. In fact, there are many recorded instances in which Qadis passed orders against the Chief of the State of the day and the latter submitted to them. The office of the Chief or Imam is elective.

ADMINISTRATIVE LAW : The Head of the State among the Muslims is the trustee of public property and in no sense its

owner. Such public property consists of all revenues which when collected are to be deposited in the public treasury (*beitul mal*) literally the house for property).

The Revenues are derived from the following principal sources: taxes levied on land belonging to Muslims, in the shape of *Ushr* (*عشر*) or tithe *kiraj* (*خراج*) or land tax, originally assessed on land belonging to non-Muslim owners, poll tax or *jiziya* leviable from non-Muslim subjects in lieu of protection afforded to them, *zakat* (*زكاة*) poor rate levied from the Muslims alone, and *khumus* (*خمس*) consisting of one-fifth of the property acquired from the non-Muslims by conquest and one-fifth of the contents of mines, escheats and forfeitures.

The Imam is also the custodian of such public property as rivers, public roads, waste lands and the like. He is the ultimate guardian of trusts and institutions intended for the benefit of the community.

Disciplinary Powers and Administration of Justice : The powers of the Imam, not only in fiscal matters but also with regard to the appointment of Qadis and otherwise providing for the administration of justice. He may appoint a non-Muslim Governor and may delegate to him the powers of appointing a Qadi. He is the trustee of public property and in no sense owner of it. Such public property consists of all revenues which when collected are to be deposited in *Baitul Mal*. From the above we conclude that the conception of State in Islam is the commonwealth of Muslims headed by Imam or Caliph.

Q. 55. What is Judicial System of an Islamic State?

OR

Discuss the Judicial System of an Islamic State?

Ans. (1) JUDICIAL SYSTEM IN ISLAM : The concept of Judicial System in Islam may be discussed under the following headings:-

- (i) Development of the Judicial System under Muslims.

- (ii) Principles of Judicial System under Islam.
- (iii) Categories of institutions set up under the judicial system of Islam.

(i) Development of Judicial System under the Muslims : The Holy Prophet (p.b.u.h.) himself set up the pattern for judicial administration. The Holy Prophet (p.b.u.h.) himself acted as the Chief Judge and he set up the highest standard of judicial probity. The Holy Prophet laid down the law of absolute equality, impartiality and fairness. He declared that even his daughter committed theft he would have her hands cut off.

During the time of Holy Prophet the principles for the application of law were also laid down. The cases were to be tried and decided in accordance with the injunctions of the Holy Quran. If the Holy Quran did not contain any commandment on the point, guidance was to be obtained from the Sunnah. If no guidance was available in the Sunnah, the judge was to apply his mind and decide the case according to his best judgment on analogy of the commandments of the Holy Quran and the Sunnah.

The Judicial System was further developed during the period of rightly guided caliphs.

(1) In the period of Hazrat Abu Bakar, the system of Qaza remained continue on the same lines as it was in the period of Prophet (p.b.u.h.) Hazrat Abu Bakar had delivered the Ummra of Daldiat with the executive, and legal powers, judicial powers also and instead of appointing permanent person has also taken the job of Qaza from Laskhar of Ummaria.

(2) Hazrat Umar separated the judiciary from the executive. He set up the police department. He also set up jails and introduced the Ifta jurisdiction.

(3) Hazrat Usman and Hazrat Ali has chosen the same way which their forefathers had adopted. Hazrat Ali also set up a jail system in his period.

Under the Umayyad there was a Chief Qazi for the empire who was stationed at Damascus, there was a Qazi for each province and a Naib Qazi for each District.

The Judicial System was further developed under Abbasides. A department of justice, Dar-ul-Adl was set up under the Qazi-ul-Quzzat. The office of Mohtasib was also set up. He was responsible for the enforcement of rights of God as well as the rights of people.

(ii) **Principles of Judicial System** : The principles of Judicial System are as follows.

(1) **JUSTICE MUST BE SUBSTANTIAL AND NOT FORMAL** : Justice must be substantial and not merely formal, which means that justice should be done not only in accordance with law (i.e. formal) but it should be done in Shura way that it results in absolute justice and complete fairness (i.e. substantial).

(2) **JUSTICE IS TO BE DONE IN THE NAME OF ALLAH** : In an Islamic State justice is to be done in the name of Allah, and Allah is fully aware of the intentions of men. In Islam therefore, the administration of justice is not based merely on overt act, the motive behind such act is also to be taken into account.

(3) **JUSTICE SHOULD BE ADMINISTERED FREELY** : In Islām Justice is the basic obligation of the State, and has therefore to be administered free. No Court-fee can be levied under Islamic System.

Source : Muslim political thoughts by and institution by S.M. SHAHID.)

(iii) **Categories of Institutions set up under the Judicial System of Islam** : There are following three categories of institution that had been set up under the Judicial System of Islam.

- (i) Mazalim Courts.
- (ii) Court of Qadi.
- (iii) Court of Muhtasib.

(i) **Mazalim Courts** : This is the highest category of Courts. They deal with the appellate matters as well as with those that are beyond the jurisdiction of the Qadi. All rights of state are adjudicated by these Courts. The procedure followed by these Courts is not restricted by the strict requirement for the Court of Qadi as

regards the number and qualifications of witnesses and the type of admissible evidence. The matters of evidence and procedure are left to the Ijtihad of the Imam.

(ii) **Court of Qadi** : The Qadi deals with Hudood, Qisas and Tazir where the requirements provided in the Shariah about witnesses and procedure are strictly followed. The Qadi also deals with the civil matters like contracts, torts and also the personal law. In other word, he adjudicates the rights of Allah as well of right of the individual.

(iii) **Muhtasib Courts** : The Muhtasib Courts which are treated as Courts by the Fuqaha, are responsible for the enforcement of the general morality and the policies of the State in accordance with the Islamic norms. Categories of institutions set up under the Judicial System of Islam: **Source** : Outline of Islamic Jurisprudence by Imran Ahsan Khan Nyazee).

Q. 56. What are the qualifications of a Qazi?

OR

What are the Qualifications of Qazi in an Islamic State? Discuss.

Ans. QAZI

(1) **APPOINTMENT OF QAZI** : The following person may appoint a Qazi.

(i) Imam (ii) Ministers and Governor (iii) Caliph and (iv) a non-Muslim ruler or Governor.

(2) **QUALIFICATIONS OF A QAZI** : Following are the qualifications of a Qazi.

(i) **Muslim** : A Qadi must be a muslim. As a non-Muslim cannot be a Qadi to decide the dispute between Muslims. However where the parties are non-Muslim, there a Qazi may also be non-Muslim.

(ii) **Free** : A Qazi must be a free person, as a slave cannot be a Qazi because he do not come up the qualities of the witness.

(iii) **Major** : A Qazi must be major. As a minor cannot be appointed at this important and sensitive post. Therefore a Qazi must possess this quality.

(iv) **Sane** : A Qazi must be Sane. As due to having this quality, he may be able to dispose of cases of important and sensitive nature by his wisdom and understanding.

(v) **Male** : It is necessary for a Qazi to be male. This condition is according to Shafi Fiqah. Whereas the opinion of Imam Abu Hanifa is different from this. According to him, a female may also be appointed as a Qazi but in those cases which are related to finances. But as far as the cases of Hadd and Qisas are concerned then she cannot issue order on them as in those cases her evidence is not admissible.

(vi) **Virtuous Character** : A Qazi must be of virtuous character. As a Fasiq cannot be appointed at this post. According to Imam Shafi, Imam Malik, Imam Ahmad and according to Imam Tammawi and Ahnaf Fiqah, it is not correct to appoint Fasiq as Qazi. The opinion of Jamhoor-Fuqqai-i-Islam is also the same.

(vii) **Jurist** : It is also necessary for a Qazi to be a Mujtahid. This qualification is necessary according to Imam Shafi', Imam Malik and Imam Ahmad but not according to Imam Abu Hanifa. As in his opinion a Qazi may be non-Mujtahid and may decide a case by taking Fatwa from Mufti.

(3) POWERS AND JURISDICTION OF A QAZI : A Qadi may be appointed for a limited time or with jurisdiction over a particular area. Similarly a particular class of cases may be excluded from his jurisdiction or he may be empowered to try only particular classes of cases. For instance, a Qadi may be prohibited from hearing cases instituted after the laps of a certain time or he may be appointed only to hear cases arising in the army or in any particular division of it. Some times two Qazi may be appointed to hear a particular case.

Power to appoint Deputy Qazi : The Qadi may appoint a deputy Qadi if he is empowered to do so by the Sultan, and he can also dismiss him. When a deputy has been properly appointed, he can pass orders on evidence heard by the principal Qazi or *vice versa*.

(4) QUASI JUDICIAL DUTIES OF A QAZI : The Quasi judicial duties of a Qazi are as follows.

(i) To protect and supervise trust property like Waqf.

(ii) To protect and supervise the properties and interest of minors, lunatics, idiots and missing.

(iii) To supervise the management and administration of Waqf.

(iv) To appoint an administrator to administer the estate of deceased person.

(5) RULES TO BE OBSERVED BY THE QAZIS : A Qazi is bound to observe the following rules.

(i) He should be dressed properly.

(ii) He must not accept any gift from the litigants.

(iii) He should not accept feasts by the litigants.

(iv) He should treat rich and poor equally.

(v) He must not try suits of his relatives partners, friends or hirelings; and

(vi) He should not extend to the litigants in excess to his residence.

(6) REMOVAL OF A QAZI : The Qazi holds his office at the discretion of Sultan who may dismiss him on suspicion or even without suspicion. Abu Hanifa says that a Qazi should not be allowed to hold office for more than a year. On the death of Sultan, however, the Qadi does not, according to accepted opinion, vacate his office.

(7) WOMAN AS A QADI : A woman may be a Qazi according to the Hanafis as she possesses the qualifications of witness, but she is not competent to pass orders of Hadd or retaliation as in these matters her evidence is not admissible. She is altogether disqualified for the office according to Shafi's.

Q. 57. What are the traditional sources of revenue of an Islamic state. Can other taxes be levied in an Islamic state?

OR

What are the traditional sources of revenue of an Islamic state?

OR

What are the sources of revenue of an Islamic state? discuss?

OR

What are the main sources of revenue of an Islamic state? Explain.

Ans. MAIN SOURCES OF REVENUE : The main sources of Revenue of an Islamic State are the following:

- (i) Zakat.
- (ii) Ushar
- (iii) Khiraj
- (iv) Jiziya
- (v) Khums
- (vi) Trade Tax.
- (vii) Fai.

(i) **ZAKAT :** Zakat is a tax imposed on the Muhammadans alone and the payment of it is an obligatory act of worship. It is also called poor rate because its use is primarily assigned for the poor, e.g., miskeens and faqeers. It is a right of God and correspondingly a duty of every adult, sane Muslim in ownership and possession of property other than land e.g., gold, silver, cattle, merchandise for the space of one complete year.

ON WHOM ZAKAT IS OBLIGATORY : Zakat is obligatory upon a person if:

- (i) he is a Muslim.
- (ii) he is an adult.
- (iii) he is a sane person.
- (iv) he is free person not slave.
- (v) he owns wealth intended for trading to the value of Nisab.

Nisab of Zakat : Nisab of Zakat in case of Gold is 7 tolas. and in case of Silver is 52 tolas. That means to say Zakat is levied on 7 tolas Gold and 52 tolas Silver.

Rate of Zakat : Zakat is a compulsory tax and it is levied at the rate of 2 percent in all yearly savings.

Masarif-e-Zakat : Shariat Islamia has fixed following eight Masarif-e-Zakat.

(i) Fuqara (ii) Massakin (iii) Aamilin (iv) Muallfatul Kaloob (v) Fir-reqab (vi) Gharmin (vii) Fi-sabeel-illah (viii) Ibtinasabeel.

Importance of Zakat : Zakat is the third fundamental of Islam. There are quite a number of verses in which the order to pay Zakat immediately follows the order to offer the prayers. (Salat).

Holy Quran Ordains : "And say your prayer and pay Zakat."

(ii) **USHAR :** The literal meaning of Ushr is one tenth. Technically it is used for the Zakat imposed on the agricultural produce. The authority to impose this tax comes directly from al-Quran:

Eat of their fruit.

In their season, but under

The dues that are proper

On the day that harvest

is gathered. (VI: 141).

Nisab of Ushar : There is no nisab fixed for ushar according to Imam Abu Hanifa. But according to Imam Abu Yousaf, Imam Shafi the nisab of ushar is five Wasaq (Five Wasaq is equal to nearly 948 Kilogram).

Rate of Ushar : A tenth or tithe is levied upon the produce of naturally irrigated (e.g., by floods, rains etc.) land and 1/20 on artificially irrigated (e.g., by well, canals) land.

(iii) **KHIRAJ :** It is a tax on the produce of land of non-muslims as ushar is upon Muslims. It can be upto 50 percent of the produce of the land.

Kinds of Khiraj : Khiraj is of two kinds, namely :

(1) Khiraj Maqasma (2) Khiraj Bilmasaha (Khiraj-wazifa).

(1) **KHIRAJ MAQASMA :** means that Khiraj in which share is determined from the produce of land. For instance 1/3rd or 1/4th of the total produce shall be taken as Khiraj.

(2) **KHIRAJ BILMASAHA (KHIRAJ-WAZIFA)** : means that Khiraj in which share is fixed by keeping in view the measurement of the field. For instance, on one acre produce, the khiraj shall be taken to this extent.

Rate of Khiraj : The rates of khiraj vary with the kind of crops grown on the land and its productive powers. It is not, however, to exceed half the value of its average produce.

Immunity from Khiraj : If the produce of the khiraj land is destroyed by floods or drought or blight the revenue ceases to be payable for that year, but not if it is destroyed by the negligence of the owner.

Khiraj at present juncture : It was an effective source of income in the early period of Islam. But today this tax is not imposed and same kind of tax is imposed on Muslims and non-Muslims.

(iv) **JIZYA (POLL TAX)** : It is an annual personal tax levied on Zimmis who had actually fought against Islam or who are able-bodied to participate in a war against an Islamic State.

Persons Competent to Pay Jiziya : Amongst non-muslims every person will be considered competent to pay Jiziya who will be:

- (i) Major.
- (ii) Sane.
- (iii) Healthy
- (iv) Free.

Persons exempted from the payment of Jiziya : There are many persons, who are exempted from the payment of Jiziya, namely:

- (i) Women.
- (ii) Minors.
- (iii) Slaves.
- (iv) Disable persons.
- (v) Monks and ascetics.
- (vi) Zimmis rendering military services.

Imposition of Jiziya---Mode : Jiziya which is also a personal tax, may be imposed on non-Muslims either under a treaty in which case its rate is to be determined or it may be as per terms and conditions of the treaty. It may be imposed after conquest in lieu of Imam confirming them in possession of their country. In the latter case, it is to be paid according to certain rates, which are fixed having regard to the means and income of each individual.

Amount of Jiziya : Shariat Islamia has not fixed any amount for the payment of jiziya. However the amount of jiziya in the period of Hazrat Umar was the following.

- (i) 48 Dirham from rich people.
- (ii) 24 Dirham from average people.
- (iii) 12 Dirham from poor people.

Payment of jiziya : The jiziya should be paid in money but it may be paid in kind e.g. in garments, cattle or even needless but wine and cattle that have died a natural death (maita) are not legal payment. The proceeds of their sale may however be taken.

(v) **KHUMS :** Literally Khums means five. It is 1/5th leviable on the spoils of war (ghaneemat), and to the same extent on mines and treasure trove. It is taken only once.

(vi) **TRADE TAX :** It is levied upon and collected from Muslim and Non-Muslim tradesmen. Its rate is fixed according to the exigencies of time.

(vii) **FAI :** Literally means the shadow of a thing in the afternoon. In the International Law of Islam, it means such movable property as well as immovable properties which come under the control of the Muslim Government in consequence of the victory of the Muslim over a territory.

OTHER SOURCES OF REVENUE OF AN ISLAMIC STATE

Following are the other sources of revenue of an Islamic State.

(i) **Mal Rukaz :** It is recoverable on assets obtained accidentally through mines, certain hidden assets, etc.

(ii) **Asset without owner :** State is the owner of such assets to which there is no Quranic sharer or residuary.

(iii) **Grooming Assets** : The income of shrubs, fruits, trees groomed on state land and also state income from forests and cattle farming are good source of revenue for the State.

(iv) **Zaraib** : Zaraib is a financial aid of the poor received from the rich in case of disobedience of economic laws of State.

(v) **Luqta** : Such mal has been said luqta to which there is no claimant. Such Ma'al remains with the Government till the discovery of real owners.

(vi) **Business Profit** : The State can conduct any kind of business permissible under Islam. The profit of such business is good source of income or revenue in Islam.

CAN OTHER TAXES BE LEVIED?

If the normal sources of revenue do not suffice and because of paucity of resources, the Islamic State is not in a position to perform the duties assigned to it by the Shariah, then it is permissible for the Islamic State to impose other taxes.

* Such new taxes should be imposed only upon the wealthy persons, who could pay them. i.e., ability to pay should be the major criterion in imposing these taxes.

These taxes should imposed only for specific purposes such as defence or taking care of the poor and needy *etc.* It is not permissible by Shariarh for the ruler to impose taxes to finance their own luxuries and conspicuous consumption.

CHAPTER 10

SOVEREIGNTY

Q. 58. Explain the concept of Sovereignty in Islam?

OR

Explain sovereignty in Islam?

Ans. (1) MEANINGS OF SOVEREIGNTY : The word sovereignty has been derived from the latin word superanus which means the supremacy of one over the other.

(2) DEFINITION OF SOVEREIGNTY : Sovereignty may be defined in these words. The supreme power over the citizens and subjects unrestrained by law."

(3) CONCEPT OF SOVEREIGNTY IN ISLAM : In Islam the word Sovereignty is used for God and God alone. No body or class even whole Islamic nation can be the owner of sovereignty. According to Islamic theory, God alone is the owner of sovereignty.

Quran Says:

- (1) "Unto Allah belongeth the Sovereignty of the heavens and the earth. Allah is able to do all things." (3:189)
- (2) "Command is for none but Allah. He hath commanded that ye follow none except Allah, i.e., the right way to follow." (12:40)
- (3) "Be ware, His is the creation and His is the rule." (7:54)
- (4) "And who hath no partner in the sovereignty." (17:111)

(4) CHARACTERISTICS OF GOD'S SOVEREIGNTY :
The Sovereignty of Allah has the following characteristics.

- (i) **Absolute :** The Sovereignty of God is absolute.

The Quran Says:

- (1) "Verily, your lord is the Doer of whatsoever He intends (or wills) (Hud: 107)
- (2) "In Whose Hands is the sovereignty of everything. (23:88)

- (3) "He cannot be questioned as to what he does" (Al. Anbiyah: 23)

(ii) **Indivisible** : The Sovereignty of Allah is indivisible. There is no concept of divisibility in His Sovereignty.

Quran says:

"And who has no partner in (His) Dominion." (Bani Israel 111).

(iii) **Inalienable** : The Sovereignty of Allah is inalienable. It cannot be transferred to anyone as there is no concept of alienability in his sovereignty.

(iv) **Unlimited** : The Sovereignty of Allah is unlimited. The limits of his sovereignty cannot be measured at all, as it extends to whole Universe, heavens and earth.

(v) **Comprehensive** : The sovereignty of Allah is comprehensive in all respects. There is no one who can challenge his this characteristic of sovereignty.

(vi) **Continuous** : The Sovereignty of Allah is continuous. Neither can suspend it. Nor can shortened it. (Quran Says:-)

"Neither Slumber nor sleep over takes him and we feels no fatigue in guarding and preserving them." (3:255)

(vii) **Eternal** : The Sovereignty of Allah is eternal. There is no down fall in his sovereignty. It is permanent by its nature.

Quran Says :

"None has the right to be worshipped but He, the Everliving the One who sustains and protects all that exists." (Al. Baqarah: 255)

(5) **Attributive Names of God's Sovereignty** : There are ninety nine attributive names of Allah's Sovereignty. Some of these are as follows.

- (1) Al-Wahid (the one)
- (2) Al-Ahad (the only one)

- (3) Al Samad (A Being on whom all depend and he does not depend on any)
- (4) Al-Khaliq (The Creator)
- (5) Al-Qayyum (The Eternal)
- (6) Al-Malik (The Master)
- (7) Al-Fatir (The Creator)
- (8) Al-Jabbar (The Supreme)
- (9) Al-Qahhar (The Almighty)
- (10) Al-Bedi (The absolute originator).

(6) CONCEPT OF VICEGERENCY : In an Islamic State, Vicegerency is not vested in any particular individual or group but in the whole Muslim citizens of an Islamic State. The Holy Quran Says:

"Allah has promised to those among you who believe and work righteous deeds that he will most surely make them His Vicegerent in the earth as He had made the like people before them His vicegerents."

This verse lays down two very important Constitutional principles.

- (i) The real Status of an Islamic State is not that of a sovereign but vicegerency.
- (ii) In an Islamic State powers of vicegerency are not vested in any one individual or family or group but in the whole of the Muslim Community.

These two principles demand that the constitution of an Islamic State must for sake all claims to Sovereignty and must recognised in clear term the vicegerency of Allah whose function is to execute His Will and Commandments.

(7) WESTERN CONCEPT OF SOVEREIGNTY : The Western concept of Sovereignty is totally different from Islamic concept. It is defined and determined through the theories of social

contracts as envisaged in books like *leisal than*, book on civil government and social contracts. According to this concept, Sovereignty is vested with one man, group of people or people at large and it is absolute and unlimited.

Comparison : The Western concept of Sovereignty is not a perfect one and there are also some limitations on it. It is not complete, absolute and final. As compared to this Islamic concept of Sovereignty is a perfect one and there are no limitations on it. It is complete absolute and final laying emphasis on the sovereignty of Allah Almighty.

(8) CONCLUSION : To conclude I can say that in an Islamic State, sovereignty vests in Allah Almighty alone. Who in order to made it determinable has delegated his legal sovereignty to determinate human superior--The Holy Prophet (P.B.U.H.). Both the Original and the Delegated constitute one, complete, inalienable, absolute and indivisible sovereignty.

CHAPTER 11

SHURA SYSTEM OF ISLAM

Q. 59. Shura is an important organ of an Islamic State. Define and discuss its role under the Islamic Constitutional Law?

OR

Discuss the importance and role of Shura in an Islamic State in the light of Quranic verse?

OR

Shura is an important pillar in Islamic Constitutional Law? Discuss.

OR

Discuss the characteristics of Islamic System of Shura?

OR

What are the salient features of Islamic System of Shura?

Ans. SHURA SYSTEM IN ISLAM

(1) INTRODUCTION : Shura is an important institution in Islam. Its concept is a divinely ordained arrangement. It enjoins the high ups to invite, rather than to allow the subjects of state to participate in solution of the problems concerning the common. It ensures prevention of concentration of powers as well as despotism and dictatorship. As it is an expression of public opinion, so it has a legal status.

(2) MEANINGS OF SHURA : Shura means consultation but in Islamic terminology it means that body of representatives of Muslim Community who assemble for consultation with each other and to reach on a decision for running the business of Govt."

(3) SHURA IN THE LIGHT OF QURAN AND AHADITH.

(i) The Holy Quran:-

The Quran says:-

(1) "And consult with them upon the conduct of Affairs" (42:30).

(2) They conduct their affairs by mutual consultation" (42:38).

(ii) The Adadith:-

The importance of Shura is also stated in the Ahadith:-

Prophet says:-

(1) "If anyone resolves on something and then after consultation, decides to do or not to do that thing, Allah guides him to the right and most useful way."

(Bai Haqi).

(2) "Consult a wise man (with intellect and understanding) and do not go against his advise; otherwise you will be sorry."

(Khatib Baghdadi).

(3) OPINION OF HAZRAT ABU HURAIRA AND HAZRAT AAISHAH.

(1) Abu Harairah said:-

"I have not seen any body who could excel the Prophet (p.b.u.h.) in consultation from Companions."

(2) Hazrat Aishah (R.A.) said:-

"I have not seen a person consulting the people more than the Prophet. He said that if Abu Bakar and Umar get together on an opinion, he would not go against that."

(4) TYPES OF SHURA:-

During the Caliphate of Omar, the Shura was divided into the following.

(a) Shura Khas and (b) Shura Aam.

(a) **Shura Khas** : Shura Khas comprised the eminent companions of the Prophet and men of outstanding calibre and learning. It was convened only for resolving matters of special importance and complicated nature.

(b) **Shura Aam** : Shura Aam comprised the people from general public. It was called after conquests to inform the public at

large of the victories, distribute of the booty and also to seek their opinion on affairs of general public interest.

(5) QUALIFICATIONS OF MEMBER OF SHURA :
The members of Shura must have these two qualities.

(1) They should be people of understanding and intellect i.e., sensible, intelligent and reasonable.

(2) They should be obedient (to Allah) and pious.

In short they should be people of reason, intelligent and obedient to Allah, so that they may be trusted to give a sound judgment and a truthful opinion.

(6) DUTY OF A MEMBERS OF SHURA : It is the duty of the members of Shura that when they have asked for giving opinion upon a particular matter, then they should give correct opinion according to their knowledge and wisdom. The Prophet warned the members of Shura in these words.

"The man who gives counsel to his brother knowing fully well that it is not right does mostly surely betray his trust."

(7) SALIENT FEATURES OF ISLAMIC SYSTEM OF SHURA : Following are the salient features of the Shura System of Islam.

- (1) It is a Guardian of Quran, Sunnah and Shariah.
- (2) It is a caretaker of public interests.
- (3) It is a reflection of people sovereignty.
- (4) It is a reflection of peace and harmony.
- (5) It is a symbol of brotherhood.
- (6) It guides the Government till the taking of right decision.
- (7) It forms public opinion.
- (8) Its decisions satisfy public opinion.
- (9) It is part and parcel of the Government rather it itself a Government.
- (10) It is permanent by virtue of its qualities.

(8) EXAMPLES OF SHURA:

(i) Examples from the period of Prophet : Holy Prophet (p.b.u.h.) has consulted his companions on many occasions. Some of them are as follows.

(1) Prophet (p.b.u.h.) has convened the meetings of Shura that whether they should meet the enemy at Badr. The Companion gave their verdict in favour of battle.

(2) At the occasion of Uhad the Prophet was of opinion that they should fight the enemy by remaining inside the city of Madina. But the Majority wanted the battle field outside the city. The opinion of majority was honoured.

(ii) Examples from the period of Companions (R.A.) : The companions of Prophet, also consulted with each other mutually. In this connection some examples are the following.

(1) The death of Holy Prophet, Hazrat Abu Bakar had been selected as his successor in the meeting of Majlis Aam through Shura. This meeting was held at the place Saqifa Bani Sada. His name was proposed by Hazrat Umar and other has accepted it unanimously.

(2) The people of Baitul Maqdis demanded that Umar should himself go there and settle the term of the treaty. The Shura was convened who decided that he might go.

(3) Hazrat Umar wanted to command the battle of Faris personally. But the Shura decided that he should stay back and he had to do so.

(9) IMPORTANCE OF SHURA IN AN ISLAMIC STATE : Since the Shura is a permanent feature of an Islamic political system , therefore its importance is very great in an Islamic State. Prophet himself has consulted his companions on certain political as well as religious affairs. After the death of Prophet, his companions also continued this practice. They used to call public meetings (Shuras) on important political, legal administrative and so co-economic issues arising after expansion of the Muslim State day by day.

✓ Hazrat Umar has explained the importance of Shura in an Islamic State through a beautiful example.

The opinion of one person is like that of single and weak thread and when two opinions in an Islamic State are assembled then they become like two strong threads and when three opinions are assembled then they become undefeated.

(10) ROLE OF SHURA IN AN ISLAMIC STATE : If Shura in an Islamic State has formed formally and consulted to this on important issue then this can play very important role. This is so because that in period of Prophet (p.b.u.h.) and Khulafai-Rashdeen the system of Shura was there and in their period this has been consulted on important matters at the hour of need and this played his role by providing reasonable consultation on these matters. There are so many examples which evidenced that Shura has played an important role in the period of Prophet (p.b.u.h.) and Khulafai-i-Rashdeen. These examples need not to describe here again as these have been described earlier.

CHAPTER 12

CONCEPT OF THE ISLAMIC STATE

Q. 60. Discuss the concept of State in Islam?

Ans. (1) MEANINGS OF STATE : The state is a community of persons more or less numbers, permanently occupying a definite portion of territory independent of external control and possessing an organised Government to which the great body of inhabitants render habitual obedience.

(2) MEANINGS OF AN ISLAMIC STATE : An Islamic State means that State where Muslim as a right are free to spend their lives according to the teachings of Islam.

(3) ISLAMIC CONCEPT OF STATE : According to Islamic Faith, the concept of State emerges from that time when God has borne Hazrat Adam and made him his Caliph on the earth. But this was the Holy Prophet (p.b.u.h.) who gave the practical shape to this concept. He laid down the foundation the first Islamic State in his Madni period. He was also appointed its head. After the death of the Holy Prophet (p.b.u.h.) the Islamic State has got not only stability in the period of rightly guided caliphs but its geographical boundaries also extended and they spread from Africa to Europe. The one large state spreading from Turkey to Egypt when all the Muslims, irrespective of their origin or place of birth or domicile comprised one commonwealth known as Ottoman Empire. Later, however, this Sultante split into smaller, independent dominions and thus several Islamic States came into being.

Concept of Islamic State in the light of Holy Quran and Hadith : (i) There are several verses which show the necessity of an Islamic State for the Muslims. Some of these verses are listed below.

(1) "So judge among them by what Allah has revealed" (Al. Maidah: 48)

In this verse of Holy Quran there has been found a clear indication of the establishment of an Islamic State. As it is clear that a Amir shall have the power to decide in any State.

(2) "O you who believe! Obey Allah and Obey the Messenger (Muhammad (p.b.u.h.)) and those of you who are in authority". (Al-Nisa-59).

In matters of knowledge, though the Amar shall be Ulemma or Mujtahideen but in political arrangement Ulil-Amar shall be the head of Islamic State. So this verse of Holy Quran also indicates the necessity of an Islamic State.

(ii) Besides verses of Holy Quran, there are also found clear indication of the establishment of an Islamic State in the Frameen-e-Nabwi. Saying of Prophet (p.b.u.h.) are that,

"It is obligatory upon a man to listen and obey the Amir whether he likes it or not, until he has been ordered of the sins. Then if order of Sin has given then neither the listening nor the obedience is obligatory."

Further said.

"Whoever has obey the Amir, obey Me and whoever disobeyed the Amir, he disobey Me."

In these sayings of Prophet, obedience of Amir has been mentioned and it is apparent that if there will be a Islamic State then there shall be Amir and he shall be obeyed.

(4) CHARACTERISTICS OF AN ISLAMIC STATE :

Following are the chief characteristics of an Islamic State.

(i) **Sovereignty of Allah :** According to Islamic theory, God is owner of all powers. As all the characteristics of sovereignty are found in Islamic theory of tauhid. It has been clearly said in Quran.

(1) "Unto Allah belongeth the sovereignty the heavens and the earth". (189:3)

(2) "And Who hath no partner in the sovereignty." (111:17)

(3) His verily is all creation and commandment." (54:7).

(ii) **Khilafat :** In Islam, right to govern has not been vested with any specific person or class but the responsibility of Khilafat

has been imposed on all the believer as a trust. In these verses of Holy Quran, the same principle has been indicated.

"Allah hath promised such of you as believed and do good work that He will surely make them to succeed (the present rulers) in the earth even as He caused those who were before them to succeed (others). (24:55)

(2) "I am going to create a vicegerent on the earth". (2:30).

(iii) Consultation : Another characteristic of an Islamic State is to carry on the administration through mutual consultation. The Quarn Says:

(1) "And those who conduct their affairs by mutual consultation." (Surah-Ash Shura).

(2) "O Muhammad consult them *i.e.*, the Companions in the affairs. Then when thou hast taken a decision, put the trust in Allah. (Al-Imran: 169).

(iv) Obedience of the ruler : In an Islamic State, Government is entitled to the obedience of the citizens till then it performed its functions according to the laws of Shariah. Prophet (p.b.u.h.) Says: In the evil deeds, obedience of Government is not obligatory upon Muslim, obedience is only in virtuous matters. He further said "The obedience of such a ruler is not obligatory who does not obey God."

God says:-

If we grant them authority in this land, will establish regular prayers and pay Zakat, and enjoin what is virtuous and forbid what is evil. (Al-Haj: 4).

(v) Independence of judiciary : In Islamic System of Government, great emphasis has been laid down on the establishment of judicial system and for this, great importance has been given to the independence and impartiality of the judges.

In the period of Hazrat Umar Department of Qaza had been set up as a separate department and thus the formal separation of powers between judiciary and executive came into being for the first time. Usually intelligent and pious individuals had been appointed as Qazi and they had been given huge salaries so that they may not induct towards bribery. There had not been found any single

example in the whole period of rightly guided Caliphs, by which it may be proved that executive had used his influence in the judicial decisions.

(5) PURPOSES OF AN ISLAMIC STATE : Following are the purposes of an Islamic State.

(i) Prayer, Zakat and Amar Bin Bilmaruf : God has said in Surah-Al Hajj of Quran.

Those (Muslim rulers) who, if we give them power in the land, (they, enjoin Iqamat-as-Salat, to pay the Zakat and they enjoin Al-Maruf and forbid Al-Munkar". (Surah Al-Hajj: 41)

In this verse of Holy Quran, three purposes of an Islamic State have been stated, i.e.; (i) Iqamat-as-Salat (ii) System of Zakat and (iii) Amar bil Maruf and Nahi-al-Munkar. As prayer is obligatory upon male and female, therefore Iqamat should be the foremost duty of an Islamic State.

As the order of Zakat is for those persons who are Sahib-e-Nisab therefore the arrangement for the establishment of Zakat is also the responsibility of State. In the same way, the promotion of Amar-bil Maruf and prevention of Nahi-An-Almunkar is also the responsibility of state because it has the capability to do this.

(ii) Establishment of Justice : The second purpose of an Islamic State is the establishment of justice. The following verses of the Quran sum up the conception of justice in an Islamic State.

(i) "O ye who believe be (firm) maintainers of justice, bearers of witness for Allah's sake even though it be against yourselves, or your parents or your kindred and whether it be against rich or poor. (IV: 134).

(ii) If (O Muhammad;) thou judgest (concerning the affairs of non-muslims) judge in equity, between them however hostile may be their attitude towards these. For Allah loveth those who judge in equity" (V: 46).

In the light of the above Quranic injunctions, it becomes incumbent upon the Head of the State to provide free impartial

justice to all irrespective of caste, creed, colour, nationality race, status or sex.

Q. 61. Write a detail note on the qualifications of Caliph, his duties and powers?

OR

What are the qualifications for Head of an Islamic State?

Ans. (1) MEANINGS OF CALIPH

(i) **Literal meanings :** The literal meaning of the word Caliph is vicegerent or Deputy.

(ii) **Legal meanings :** Legally Caliph is that sovereign of Muslim who being the deputy of Prophet established Islamic code of conduct in social life through Islamic sources and enforce every kind of Islamic laws and remove those problems which come in the way of establishing deen and implementation of law.

(2) OFFICE OF CALIPH IN THE LIGHT OF QURAN
: There are various verses in the Holy Quran in which it has been announced to vest the office of Caliph to man. Some of these verses are:

- (1) And when the lord said to the angles verily I am about to place on the earth a Khalifah." (2:30)
- (2) "Allah has promised to those among you who believe and work righteousness that shall will make them Khalifa upon the earth." (Al. Noor-55)
- (3) "It is He (Allah) who has made you Khalifah on the earth, and has raised some of you above others by grades in order that He may test you by his gifts." (Al. Imam: 160)

(3) QUALIFICATIONS FOR CALIPH OR HEAD OF STATE : The Caliph or the Head of State must have the following qualifications:

(i) **Muslim :** He must be a Muslim. As a Muslim has only the quality to run the affairs of Muslim State. Therefore a candidate for this post should have possess this qualification.

(ii) **Male** : He must be a male as Islamic Shariat only authorises a male to become Caliph of an Islamic State. So a female is ineligible to become a caliph.

(iii) **Free** : He must be a free person. That means to say, a person who wishes to become the Caliph or Head of State must not be a slave but a free person.

(iv) **Adult** : He must be an adult person. As a responsibilities of this great office cannot be handedover to a minor person. Therefore, a candidate for this office should be an adult person.

(v) **Sane** : He must be a sane person, as a insane or lunatic cannot be appointed on this post in any case. As regards the nature of this office, it is necessary for a Caliph or Head of State that he is sane.

(vi) **Free from infirmities** : He must be free from all physical and mental infirmities. As a person who is not free from physical and mental infirmities, is ineligible to become a caliph of an Islamic State. So in order to be a caliph it is necessary that one is free from physical and mental infirmities.

(vii) **Opinion maker** : It is necessary for a Caliph to be an opinion maker. He must have the ability to form opinion about different matters and his opinion should be better than the opinion of other persons.

(viii) **Prudence and talent** : He must have prudence and talent to understand a problem from the prospective in which it has been presented to him.

(ix) **Expert of religious knowledge** : He must be an expert of religious knowledge so that he may not cross the limits of God in ignorance.

(x) **Capacity to Safeguard Public Interest** : He must be intelligent and has the capacity to safeguard public interest and to carry on the state affairs.

(xi) **Courage and energy** : He must have the courage and energy to defend the Muslim territory.

(xii) **Capacity to implement laws** : He must have the capacity to implement those laws which he has issued.

(xiii) **Spotless character** : He must be of spotless character. His repute should not be bad in any way.

(4) **DUTIES AND POWERS OF CALIPH OR HEAD OF STATE**

(i) **DUTIES** : The Caliph has the following ten duties to perform.

(i) **To safe Guard and Defend Religion** : The safeguard and defence of the established principles of religion as understood and propounded by the consensus of ancient authorities. If any one innovates an opinion or becomes a sceptic, the caliph should convince him of the real truth, correct him with proper arguments and make him obey the injunctions and prohibitions of the Shariah so that the people at large may be saved from the evil effects of heresies.

(ii) **To dispense and dispose of justice** : The dispensation of justice and disposal of all litigations in accordance with Shariah. The caliph should curb the strong from riding over the weak and encourage the weak to take their due in face of the Strong.

(iii) **TO MAINTAIN LAW AND ORDER** : The maintenance of law and order in the country to make it possible for the people to lead a peaceful life, proceed in their economic activities freely and travel in the land without fear.

(iv) **To enforce criminal code of quran** : The enforcement of the Criminal Code of the Quran to ensure that the people do not outrage the prohibition of God, and that the fundamental rights of men are not violated.

(v) **To defend the frontiers** : The defence of the frontiers against foreign invasions to guarantee the security of life and property of Muslims and non-Muslim alike in the Islamic State.

(vi) **To organize and prosecute religious war** : The origination and prosecution of religious war against those who oppose Islam or refuse to enter the protection after Islamic state as non-muslim subjects. The caliph is bound by the covenant of God to establish the supremacy of Islam over all other religions and faiths.

(vii) **To Collect Khiraj and Zakat** : The collection of Khiraj and Zakat taxes in accordance with the laws of the Shariah and the interpretation of the jurists without resorting to extortion by pressure.

(viii) To Appoint Allowances and Stipend : The appointment of allowances and stipends from the state treasury (Bait-ul-Mal) to those who are entitled to them. This money should not be expended with extravagance or stinginess and must not be either prepaid or delayed.

(ix) To appoint honest and sincere men : The appointment of honest and sincere men to the principal offices of state and to the treasury to secure sound and effective administration and to safeguard the finances of the state.

(x) To look into affairs of dominions : The Caliph should personally look into and apprise himself of the affairs of his dominions so that he may himself direct the national policy and protect the interests of the people. He should not entrust his responsibility to others and engross himself in luxury of religious devotion duties of caliph.

Duties of State source : Muslim political thoughts and institutions by S.M. Shahid).

(ii) POWERS : The powers of Caliph are as under--

- (i) He may delegate his powers to different persons.
 - (ii) He may appoint ministers to whom he may delegate practically all of his powers and faculties or only particular powers.
 - (iii) He may appoint them merely for the purpose of consultation and for executing orders.
 - (iv) He may appoint a person as governor of a particular country with such powers as may be necessary.
 - (v) He may also delegate the exercise of his authority in the various departments of administration of different offices, such as the command of the army, administration of justice revenue, police and the like.
 - (vi) He has no legislative powers at all, though he may interpret the law if he happens to be a jurist.
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CHAPTER 13

LAW REGULATING RELATIONS BETWEEN MUSLIMS AND NON- MUSLIMS

Q. 62. Discuss the concept of Jihad in Islam. What acts are permissible in war?

OR

Why Jihad is Waged? What acts are permissible and what not during Jihad?

OR

What acts are permissible and what not during Jihad?

OR

Define and discuss jihad. How is it waged?

OR

What acts are permitted under the Islamic International Law during the war?

OR

What acts are forbidden by Islamic Law in the conduct of war? Discuss

OR

How and when war can be waged?

Ans. (1) MEANINGS OF JEHAD : The Word "Jihad" is derived from Jahid which means struggle to the utmost of one's capacity.

(2) DEFINITION OF JEHAD : Al Kasanniy, defines jihad in these words.

"Jihad in the technology of law is used for expending ability and power in fighting in the path of God by means of life, property, tongue and other than those."

(3) JEHAD IN THE EYE OF GOD : Allah has said about jihad at many places in the Holy Quran, as for instance.

- (i) "And wage war on all the idolaters as they are waging war on all of you. And now that Allah is with those who keep their duty (unto him). (IX: 36)
- (ii) "And fight them until persecution is no more and religion is for Allah." (11:193)

(4) JEHAD IN THE EYE OF HOLY PROPHET (P.B.U.H.) : Some Sayings of Holy Prophet (P.B.U.H.) in respect of jihad are as follows.

- (i) "Wage war against the infidels with your wealth, your lives and your speech." (Abu Dawood)
- (ii) "The best of all the believers is he who fights in the way of Allah with his wealth and his life." (Muslim and Bukhari)

(5) DECLARATION OF JEHAD : Only the Caliph or Head of State can declare Jihad.

About declaration of Jihad Sir Abdur Rahim Says:

"The Imam would be justified in declaring such war against the Non-Muslims of Daral-Harb or an alien state for the protection of religion."

(6) WHY JEHAD IS WAGED : Jihad is waged to protect and uphold Islam and Muslim Ummah for the will of God.

Conditions for Waging Jihad : Before waging Jihad, the fulfilment of following conditions is necessary.

(i) To invite non-Muslims to Embrace Islam : No Jihad can be waged unless the non-Muslim subjects of the hostile state have first of all been invited to embrace Islam.

(ii) To Agree non-Muslim to pay Jiziya : No Jihad can be waged unless Non-Muslims have been agreed to pay the jizya and if they do not agree to pay jizya then jihad may be waged against them.

(iii) To set differences in a treaty of Peace : No Jihad can be waged unless an effort has been made by Head of State to set out differences in a treaty of peace.

(7) METHODS OF DOING JEHAD : There are following three methods of doing jehad.

(i) **Jehad-bil-Mal :** Any person who contributes financially to launch jehad, since he himself cannot take part physically is called jehad bil Mal. This is easier than other jehads.

(ii) **Jehad-bil-Nafas :** To fight the enemy personally. This is the best way of jehad and is preferable to any other type of jehad.

(iii) **Jehad-bil-Ilam :** If a person contributes his abilities for the service and spread of Islam it is jehad bil Ilam. It concerns with the preaching of religion and fiqh. Thus he works for the glory of Islam by means of his actions, knowledge and deeds. In the modern world this type of jehad carries a lot of importance.

(8) TYPES OF JEHAD : These are as follows:

(i) **Internal Jihad :** It means to strengthen and keep peace, within the country, when evil powers are trying to disturb the peace for example, to fight against smuggling, lawlessness and other social evils.

(ii) **Fiqri Jihad :** When the religion is attacked by enemies of Islam, then it is the duty of Muslims to contradict such propaganda in the light of Quran and Sunnah it is fiqri jehad.

(iii) **Musala Jihad :** This is the best mean to be applied against the enemies of Islam. It is of two types.

(a) **Dafie Jihad :** When Islamic State is attacked by enemies of Islam, jehad to defend the country is Dafie jehad.

(b) **Iqdami Jihad :** When the enemies of Islam do not stop doing evils against Muslims then to declare war and attack the enemy is called Iqdami jehad.

(9) ACTS FORBIDDEN IN JEHAD : The following acts are forbidden during the jehad.

(1) Unnecessary cruelty in killing others in jehad.

(2) Killing non-combatants.

(3) Mutilation of men.

(4) Unnecessary devastation, destruction of harvest, cutting trees.

- (5) Slaughtering animals other than necessary for food.
- (6) Excess and wickedness.
- (7) Adultery and fornication even with captive women.
- (8) Killing enemy hostages.
- (9) Severing the head of some fallen enemy.
- (10) Killing peasants when they do not fight.

(10) ACTS PERMITTED IN JEHAD : These are as follows:

- (1) If the enemy is absent, ambush may be laid for him. If he is present yet out of reach, he may be besieged.
- (2) Recourse might be had to ruses.
- (3) The enemy might be attacked with all kinds of weapons.
- (4) Propaganda.
- (5) Assassination for diminishing greater bloodshed.
- (6) Night attacks.
- (7) Unintentional killing of non-combatants is exempted from punishment.
- (8) Enemy property may be destroyed or captured.
- (9) Water supply of the enemy may be cut off or in some other way made unusable.
- (10) Food and fodder may be obtained from the enemy country.

Q. 63. What are the lawful wars under the Islamic International Law?

Ans. LAWFUL WARS UNDER ISLAMIC INTERNATIONAL LAW : The lawful wars under Islamic International law are the following:

(1) DEFENSIVE WAR : Defensive war has been declared valid under Islamic International Law. That means to say if a non-muslim state invades on an Islamic State then defensive war against this non-muslim state is valid. Quran Says:

- (1) "Sanction is given unto those who are fought against because they have been wronged and God is indeed able to give them victory". (Al Hajj 39)
- (2) "Fight in the Path of God against those who fight against you, but do not transgress Lo! God loveth not transgressors."

Examples of danger to war:

- (1) Life in Madina after Hijrah.
- (2) Expedition against Dumatul Jandal in 5. A.H. When the local Chieftain was molesting the caravans coming from north to Madina.
- (3) The attack on Khaibar is an instances of nipping war in the bud.

Saying of Prophet (p.b.u.h.) : An important saying of the Prophet (p.b.u.h.) enumerates the kinds of defensive wars and says.

"Whoever fights in defence of his person and is killed, he is a martyr, whoever is killed in defence of his property, is a martyr, whoever fights in defence of his family and is killed, is a martyr and whoever is killed for the cause of God, is a martyr."

(2) **PUNITIVE WAR :** This is the armed action against the organised apostates, rebels, international highwaymen and the parties who break the covenants.

(3) **IDEALISTIC WAR :** This is for the sake of establishing the universal kingdom of God and subordinating the non-Islamic sovereignties to the Sovereignty of God. The Quran says:

- (i) He it is who hath sent his Messenger (*i.e.* Muhammad) with the guidance and the Religion of truth that He may cause it to prevail over all religion, however much the associators may be averse."
- (ii) Ye (*i.e.*, the Muslims) are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency and ye believe in God."

The Prophet Says:

"Whoever from among you sees an indecency, he must change it by his hand if he cannot he must do so by his tongue; if he cannot he must do so by his heart (through disapproval *etc.*) but this last would justify to the extreme weakness of Faith.

(4) SYMPATHETIC WAR : When the Muslim living in a non-Muslim society seek the help of the Islamic State against their tyrant Government.

Regarding the Muslims in non-Muslim State seeks helps, the Quran directs.

- (i) And those who believe but have not left their homes ye have no duty to protect till they leave homes but if they seek help from you in the matter of religion then it is your duty to help (them) except against a folk between whom and you there is a treaty, God is seer of what ye do (72: 8)
- (ii) How Should ye not fight for the cause of God and of feeble among men and of the women and the children who are crying; our lord Bring us forth out from this town of which the people are oppressors! Oh give us from the presence some protecting friend! Oh give us from the presence some defender! those who believe do battle for the cause of God! and those who disbelieve do battle for the cause of the Devil." (76.75:4)

Q. 64. What acts are permissible and what not during Jihad?

Ans. (1) ACTS PERMISSIBLE DURING JEHAD :
During war the following acts are permitted under Muslim International Law.

(i) Killing of enemy combatants : Enemy combatants might be killed, wounded, pursued and made captive. Kasani says:-

And the principle therein is that all those who are potentially capable of fighting may be killed, no matter whether they actually

fight or not, such as by means of propaganda, influence, inciting and the like.

(ii) **Use of all kinds of weapon** : Use of all kinds of weapon have been declared valid against enemies during Jihad under the Islamic International Law. But it is also said as to their use. That they should not be used in this way that there cause unnecessary bloodshed.

(iii) **Use of propaganda** : Recourse must be had to powerful propaganda. The Quranic verse relating to the Islamic Budget allots a portion of income for propaganda.

The Quran provides the budget for the following purposes.

(i) Those whose hearts are to be won to aid Muslims.

(ii) To persuade them to abstain from doing harm to Muslims.

(iii) To induce them to embrace Islam.

(iv) To give inducement to others through them.

(iv) **Causing of misunderstanding** : Causing of misunderstanding between the different section of enemies has been declared valid during Jihad. To keep the enemies unaware from real intentions, misunderstanding may be caused between them. At the time of war of Khandaq, the Holy Prophet (p.b.u.h.) had also exercised this method and had caused misunderstanding between the enemies.

(v) **Cutting fruit bearing trees** : The cutting and putting to fire of fruit bearing trees is permitted during Jihad. The Holy Prophet (p.b.u.h.) had put to fire the Date' trees of Bano Naseer's Garden.

(vi) **Assassination of enemy** : Assassination is permitted under Muslim International Law. We have found such practice at the time of prophet. This is for the purpose of reducing bloodshed.

(vii) **Cutting of water supply** : The water supply of the enemy may be cut off or in some other way may be made unusable for them.

(viii) **Obtaining of food and fodder** : During war food and fodder may be obtained from an enemy country even by force.

(ix) **Destroying or capturing enemy property** : During Jihad, the property of enemy not only may be captured but it may be destroyed also.

(2) **FORBIDDEN ACTS** : The following acts are forbidden during the Jihad.

(i) **Killing of non-combatants** : The killing of non-combatants have been declared invalid during Jihad but it is permitted when the enemy soldiers are around them or when they are taking shelter behind them. It is warned that soldiers aim must not be to kill non-combatants.

(ii) **Cruel ways of killing** : The cruel ways of killing the enemies have also been declared invalid during war. The Prophet (p.b.u.h.) has said "Fairness is prescribed by God in every matter; so if you kill, kill in a fair way.

(iii) **Surprise attack** : Surprise attack is also an act which has been declared invalid during Jihad. Before launching attack on the enemy, they should have offer Suzerainty or surrender. As without this formality, the surprise attack and achievements in consequence thereof are unlawful.

(iv) **Killing of women** : Islam has condemned the killing of women during Jihad. But if any woman is the Queen of enemy's country and she is also running the management of Government then Fuqqah give Fatwa to kill her.

(v) **Mutilation of men as well as beasts** : Islam has stopped the Muslim army from the Mutilation of men as well as animals. So this is also an act which has been strongly forbidden during Jihad.

(vi) **Killing of the prisoners of war.**

(vii) **Unnecessary destruction of harvest and cutting of trees.**

(viii) **Adultery and fornication with captive women.**

- (ix) Killing of envoys even in retaliation.
- (x) Massacre in the vanquished territory.

Q. 65. Some Muslim Jurists divide the world into two parts. Darul Harb and Darul Islam. What are the consequences of such Division? Discuss?

OR

Discuss and distinguish between Darul-Islam and Darul Harb?

Ans. INTRODUCTION : Under the Islamic International Law, the world has been divided into Darul Islam and Darul Harb. This division has actually been made on the basis that there are two nations in the world: Muslim and the Non-Muslim. The persons who submit absolutely to the Shariah are the Muslims. The rest of people whether they follow the repealed, and corrupted revelations or patronize the men-made customs and traditions fall in the category of the disbelievers. In the eyes of Islam, all of them inspite of their mutual differences constitute one Nation. There is a saying of Holy Prophet (Peace be upon him).

"All disbelievers are like members of a nation."

Therefore according to Islamic International law there are two nations in the world i.e. Muslim and Non-Muslim and on the basis of these two nations world has been divided into Darul-Islam and Darul-Harb.

(2) DARUL-ISLAM

(i) Meaning of Darul Islam : Darul-Islam literally means territory of safety.

(ii) Definition of Darul Islam : A territory which is governed by Muslim Ruler according to the laws of Islamic Shariah is known as Darul Islam.

(iii) Features of Darul Islam : A Darul Islam, territory of safety, has the following features--

- (i) It is a territory which is governed by Muslim ruler.

- (ii) Laws of Islamic Shariah are enforced there.
- (iii) Muslims are free to perform their Ibbadat.
- (iv) Juma and Eidain prayers are regularly performed.

(3) DARUL HARB.

(i) Meaning of Darul Harb : Darul Harb literally means territory of war.

(ii) Definition of Darul Harb : A territory, where Muslim cannot maintain their personal safety and performance of their religious duty is known as Darul-Harb.

(iii) Features of Darul Harb : A Darul Harb, territory of war, has the following features--

- (i) It is a territory which is generally governed and ruled by Non-muslim ruler.
- (ii) Laws of Islamic Shariah are not enforced there.
- (iii) Muslims are not free to perform their Ibbadat.
- (iv) Juma and Eidain prayers cannot be performed with religious freedom.

(iv) Conversion of Darul Islam into Darul Harb : It turns into Darul Harb if it fulfils three conditions, namely:

- (i) that the laws and regulation of the non-Muslim be enforced there.
- (ii) that it should be surrounded by other countries answering the description of Darul Islam being contiguous to it.
- (iii) No Muslim or Dhimmī, that is, a Non-Muslim subject of a Muslim State, can live there, in the same security as under the previous Muslim Government.

(v) Conversion of Darul Harb into Darul Islam : A Darul Harb on the other hand, becomes Darul Islam if the Ordinances of Islam may validly be promulgated there.

(4) TEST TO DETERMINE DARUL HARB OR DARUL ISLAM : One of the test, as to whether a country should

be treated as a Darul Harb or Darul Islam, is whether congregational prayers during Fridays and Ids should be held in the country. Under what circumstances then the holding of Friday prayers is allowed by the Muhammadan Law? One of the conditions mentioned in the books is that such prayer can be said only in a town where there is a Governor and a Qazi to administer the laws and to enforce the punishment of Hadd and retaliation.

(5) CONSEQUENCES OF DIVISION OF DARUL ISLAM AND DARUL HARB : The main consequences which appear by the Division of Darul Islam and Darul Harb are as under:

(i) Mutual relations of Muslims and Non-Muslims : In Darul Islam Muslims are present as dominant power whereas non-Muslim live there as taxpayer's citizens. Where complete religious freedom and protection of life and wealth is available to them. In Darul Harb Muslims live as subjugation. Therefore great difference is caused in their relation with the Non-Muslims.

(ii) Jihad : In Darul Harb Muslim can use Mal Ghanimat before Division but after coming out of Darul Harb use of Mal Ghanimat is not allowed unless it is divided.

(6) DIFFERENCE BETWEEN DARUL ISLAM AND DARUL HARB : The points of difference between Darul Islam and Darul Harb are as under.

(i) Government : Darul Islam is governed by Muslim ruler, where as Darul-Harb is governed by Non-Muslim Ruler.

(ii) Laws : In Darul Islam, laws of Islamic Shariah are enforced. Whereas in Darul-Harb, laws of Non-Muslims are enforced there.

(iii) Religious freedom : In Darul Islam Muslims have religious freedom where as in Darul Harb this freedom may or may not be available to them.

(iv) Subjugation : In Darul Islam Muslims are ruler and Non-Muslims are their subjugate. Whereas in Darul Harb Non-Muslims are ruler and Muslims are their subjugate.

(v) **Payment of Tax** : In Darul Islam, Non-Muslim pays tax to the Islamic State whereas in Darul-Harb Muslims are bound to pay the tax.

(vi) **Division of Mal Ghanimat** : In Darul Harb Maal Ghanimat can be used before Division. Whereas the same cannot be used after coming out of Darul Harb unless it is divided.

Durri-Danish

CHAPTER 14

MUSLIM INTERNATIONAL LAW

Q. 66. Write a detail note on Muslim International Law.

Ans. MUSLIM INTERNATIONAL LAW : International Law means rules of the conduct of States in their mutual dealings. Islam has elaborated its own system of public international Law. Muslim International Law may be defined as "that part of law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* State observes in its dealings with other *de facto* or *de jure* States.

Muslim International Law depends wholly and solely upon the Will of the Muslim State, which in its turn is controlled, by the Muslim Law (Shariah). It derives its authority just as any other Muslim law of the land. Even the obligations by international treaties have the same basis, and unless they are rectified and executed by the contracting Muslim party, they are not binding. The International Law, *e.g.*, the rules of State-conduct in times of war, peace and neutrality, form part of the ordinary law of the land, the *Fiqh*.

Muslim International Law is only that which is observed by a State which acknowledges Muslim law as the law of its land in its dealing with other States. These other States may be Muslim or non-Muslim. All our conduct of State must be based on the commands of God, received through His Messenger, Prophet Muhammad (*peace and blessings of Allah be upon him*). The Muslim International Law is also based on these commands.

SOURCES OF MUSLIM INTERNATIONAL

LAW : Following are the sources of Muslim International Law :

(1) **QURAN :** It is the basis of all the laws. It is a collection of Divine Revelations. It was revealed upon Holy Prophet over a period of 23 years. A fair copy of Holy Quran was prepared in the form of a Book during Abu Bakr. The order of the Verses was to remain as prescribed by the Holy Prophet.

(2) **SUNNAH :** Sunnah or Hadith is the second source of International Law.

(3) **ORTHODOX PRACTICE :** The practice of the Holy Prophet and his Successors--found in books of Hadith, history, biography, case-law and other publications. The precedents of the time of the Orthodox Caliphs may be accepted in addition to the traditions of the Holy Prophet.

The opinions of the Companions carry much weight, though there was difference of opinion among them regarding matters for which there was no provision in the Sunnah of the Holy Prophet.

(4) **PRACTICE OF OTHER MUSLIM RULERS :** Some of the Umayyads and Abbasids, Salahuddin the Great, Aurangzeb in India and many other Muslim rulers have left many a useful precedents; the importance of which cannot be ignored. However, it should not contravene Holy Quran and Sunnah.

(5) **OPINION OF JURISTS :** Ijma and Qiyas -- Consensus of opinion. Individual opinions of jurists and political scientists. Analogy, deduction, equity, judicial decisions and other opinions of individual authority expressed in their books; for example,

(i) Work on 'Siyar' or International Law proper.

- (ii) Works on Fatawi or collections of judicial decisions, case-law and the like.
- (iii) Works on Fiqah.
- (iv) Works on political sciences, sociology and allied subjects.
- (v) Work on administrative and public law.
- (vi) Work on general and particular history, biography, poetry and allied subjects.
- (vii) Proceedings of conferences.
- (viii) Modern works on Muslim International Law.

(6) AWARDS OF ARBITRATORS AND REFEREES : There are Muslim cases of this kind in the international conflicts.

(7) TREATIES AND CONVENTIONS : Bilateral and multilateral treaties, between countries, being binding.

(8) OFFICIAL INSTRUCTIONS : The next source is contained in official instructions to generals, admirals, ambassadors, delegates and representatives; those officers who had connections with conduct of the State.

(9) RECIPROCITY : Official instructions have also be recognized since very early times the reciprocity as a valid source of Muslim Law.

(10) INTERNAL LEGISLATION AND UNILATERAL DECLARATIONS : Distinction should be made between general rules of international conduct and particular rules concerning particular class of individuals, *e.g.* command of the Prophet that

non-Muslims should be expelled from Arabia where they can no longer settle and the Quranic injunction that non-Muslims cannot enter the Grand Mosque of Makkah for worship.

(11) CUSTOM AND USAGE : The place of custom, usage, connections and the like in Muslim law is very important.

OBJECTS AND AIMS : Knowledge of Muslim Law is well-being in the eternal next world.

Abandoning the world is not Islamic. Islam believes in the enjoyment of the amenities of life within the limits of legality and not to trespass in the equal rights of others. In other words, one should not abuse one's power by oppressing the weak yet rightful strangers. The Quran believes in fulfilling the contract entered into. Islam believes in constant struggle for the well-being of the entire community. It teaches cooperation with non-Muslims. It does not teach compulsion in religion.

The ultimate object of Islam is to lead one's life in the fairest possible way.

Muslim International Law would aim at the justiest possible conduct of the Muslim Ruler in his international intercourse.

Q. 67. Write a note on Treatment of Enemy persons.

Ans. TREATMENT OF ENEMY PERSONS : Generally, Muslim law has maintained a considerable distinction between Muslim and non-Muslim subjects. In many respects, the latter are better off. They are exempt from the surplus property tax (Zakat) which all the Muslims pay every year at the rate of two and half per cent on their savings, above the minimum of 200 dirhams or about Pound 2 and 10 pence. Non-Muslims are also exempt from

compulsory military service and their cases are judged according to their personal law. Their life and property is protected by the Muslim State even as those of the Muslim subjects. In return for all this, they are required to pay annually from 12 to 48 dirhams per head, with several exceptions. It is called capitation tax ().

If war breaks out, enemy persons might be found either in Islamic territory, having come there by permission obtained by them previously or in their own territory or in the war zone. Treatment of these different categories differ considerably.

ENEMY RESIDENT ALIENS: By 'Mustamin' means a person who temporarily resides in a foreign country by permission. Literally it means one who seeks protection. In Arabic, no different terms are used which distinguish between a Muslim going to non-Muslim territory and a non-Muslim coming to Muslim territory.

Such a foreign resident in Muslim territory is as safe at the outbreak of war between his State and the Muslim State as before. He might return home whenever he liked; he might even take with him all his property. Contraband is not allowed. Whatever he has brought with him he can take it back. He can go anywhere he likes but not to go to some other country which is at war with the Muslim State when it is feared that they would join forces there against the Muslims. He can go to his own country even if it is in war with Muslim country. For to detain him would be a violation of pledge.

ENEMY AT HOME: Enemy persons living in their homes have to suffer the severities of siege and other incidents of war. When their town is conquered and occupied by Muslim forces, their treatment depends on the terms of surrender and capitulation or general proclamation by the officer commanding.

ENEMY IN THE WAR ZONE : In the actual war zone not only the enemy but even others could not claim absolute security. Muslim soldiers should not fire directly on neutrals, women and minors and other non-fighters, yet if any damage is done unintentionally, no responsibility is to be placed on the Muslim army.

So far as the war is concerned, no distinction is made between any enemy subject and foreign allies, taking part in fight, against Muslims. But distinction is made between able-bodied combatants and following of the army, contractors, traders and physicians and reporters *etc.*

Q. 68. Write a note on Prisoners-of-War.

Ans. PRISONERS-OF-WAR : Till the seventeenth-century the prisoners-of-war were enslaved in Europe. Grotius advised the European nations to release the prisoners-of-war in exchange or on the payment of ransom. Nobody took notice of his advice for one century. Ransom and exchange started being practised in the eighteenth century. Along with this practice, the mass killing also continued. In 1799 a Turkish army of four thousands was made to surrender by Napoleon with the promise of safety of their life. But he killed all of them.

Former rules regarding prisoners-of-war were framed in the Brussel's Conference of 1874. The first Hague Conference of 1899 adopted those and the second Hague Conference of 1907, after making some additions, made the Hague Rules as an International Law. The Geneva Convention of 1929 replaced the Hague Rules; and the Geneva Convention of 1949 superseded those of 1929. The 1949 Convention contains a code of principles for the fate and humane treatment of the prisoners-of-war. The important rules are :

- (i) The prisoners-of-war shall be in the custody of the belligerent State and not that of any individual.
- (ii) Except for the officers, the detaining State can exact labour from them.
- (iii) The detaining State shall be responsible for their maintenance. The officers shall be paid according to the pay scales of the officers of the detaining State, which will be subject to repatriation.
- (iv) They shall be subjected to humane treatment.
- (v) They shall obey the laws of the detaining State.
- (vi) They shall be permitted to perform their religious rites.
- (vii) Their wills shall be executed.
- (viii) They should not be exposed to brutality to procure information useful for the conduct of operations.
- (ix) They should be released and repatriated without delay after the cessation of active hostilities. (Arts. 118-119).

As a whole, the Geneva Conventions have not made any significant addition to the treatment of prisoners-of-war prescribed by Islam. The Islamic provisions in this respect are :

- (i) The prisoners must be fed and well treated until a declaration is reached regarding them.
- (ii) They are not to be charged for their maintenance. This is to be borne by the capturing Islamic State.
- (iii) Arrangement is to be made to do away with their discomfiture like sickness, etc.

- (iv) They have the right to draw up wills for their property at home, which would be communicated to the enemy.
- (v) The near relatives are not to be separated from each other.
- (vi) The position and dignity of the prisoners is to be respected.
- (vii) There is no evidence in the early Muslim history of exacting labour from prisoners.
- (viii) A prisoner cannot be held responsible for mere acts or belligerency.
- (ix) The prisoners can be tried and punished for crimes beyond the rights of belligerency. The two prisoners of the battle of Badr were beheaded by the order of the Prophet.

In fact the provisions of Islam are much ahead of the Geneva Conventions. For instance ;

- (i) The treatment provided by Geneva Conventions is in the nature of a multilateral treaty. The nations agreeing to this, expect corresponding treatment from each other. Islam provided such human treatment unilaterally, and under the circumstances when the Muslim prisoners were being treated very cruelly by the enemy. Ibn-i-Rushd has recorded consensus of opinion to the effect that a prisoner *qua* prisoner cannot be killed.
- (ii) The Geneva Conventions recommend facilities which are equal to those available to the armed personnel of the capturing State. On the other hand, the Muslims,

under the directions of the Prophet (peace be upon him), contended themselves with dates and fed the prisoners in their charge with bread.

- (iii) No labour is to be exacted from them.
- (iv) The cost of their maintenance is not to be repatriated.

Q. 69. Write a note on Treatment of Prisoners of War.

Ans. TREATMENT OF PRISONERS OF WAR: There are two situations :

- (i) Muslim soldiers or other subjects made captive by the enemy.
- (ii) Subjects and soldiers of the non-Muslim power taken prisoners by Muslims.

MUSLIM PRISONERS: A Muslim prisoner is bound to observe his parole and honour. If he had given no parole, he is at liberty as he likes and is able to escape or do harm to his captors.

As regards Muslim subjects, it is the duty of the Muslim State to seek their release by giving money from the public treasury. This can be done even by exchange of prisoners.

ENEMY PRISONERS CAPTURED BY MUSLIMS: A prisoner cannot be killed. This does not exclude the trial and punishment of prisoners for crimes beyond rights of belligerency (fighting). Even the belligerents or captured, would not be held responsible for damage they inflicted on Muslims regarding life and property. This would be so even when they embrace Islam or become Muslim subjects. The same is true regarding the capture of property.

According to Abu Yousuf, prisoners must be fed and well treated and they are not to be charged for their food, the cost of which is to be borne by the capturing Muslim State. However, if

they tried to escape or otherwise violate discipline, they might be punished.

Muslim law leaves to the discretion of commander to decide whether prisoners of war to be ; (a) beheaded, (b) enslaved, (c) released on paying ransom, (d) exchanged with Muslim prisoners or (e) released gratis.

1. BEHEADING OF PRISONERS : According to Abu Yousuf, a prisoner can only be beheaded in the interest of Islam, only in extreme cases of necessity and in the higher interests of the Muslim State; beheading to be ordered only by the Head of State.

2. ENSLAVEMENT : The Holy Prophet declared that Arabs could not be enslaved. The Caliph Umar issued orders that peasants, artisans and professionals of belligerent countries should not be enslaved. The Quran advocated liberation of slaves, and provided that the income of the Muslim State should partly be allotted for freedom of slaves.

However, Islam has tried to minimize slavery, it has not abolished it altogether. Certainly it is not necessary to enslave prisoners of war, yet it cannot be denied that the Supreme Commander of any army has the choice to accord the prisoners either enslavement or any other treatment. (For a slave of a Muslim, he has a right to equality with his master in food, clothing and dwelling.)

In fact, there are circumstances in which it may be in the interest of humanity to have recourse to enslavement. For example, if a people religiously believe that all aliens are untouchable and treat human beings worse than animals--it is in the interest of humanity to proceed internationally against such inhuman people to

enslave them, and to put them under the mandate of a people who have no prejudices of colour or race or language.

3. RANSOM : The Quran has legalized releasing prisoners of war on ransom and compensation. It was done during Prophet's time. So they were required sometimes to teach a number of Muslim boys reading and writing; sometimes money in gold or silver was demanded; sometimes other goods *etc.* spears and ammunition of war was accepted.

4. EXCHANGE OF PRISONERS : Instances during lifetime of the Prophet: sometimes one for one, at other, one for more, --- or value of ransom of prisoners was fixed in money.

5. GRATUITOUS RELEASE : The Quran has recommended this when hostilities have ceased. From the battle of Badr until Prophet's death, there has been cases of gratuitous releases of prisoners every now and then. There were cases of release on parole that they would not more take part in hostilities against Muslims.

Q. 70. What is the concept of nationhood in Islam? What is meant by two Nation Theory?

Ans. (1) CONCEPT OF NATION IN ISLAM : Ordinarily the concept of Nation has been bounded in the Geographical or social limits. The view of one school of thought is that nationhood is been formed from Geographical boundaries. That means to say that the people of a particular area or state shall be considered a nation and the view of second school of thought is that nationhood is formed from a race. The individuals of one race will be a nation. Islam has given its concept of nationhood by totally departing from the concept of geographical nation and social nation. In Islam; the foundation of nationhood is not geographical unity, or colour or race but to accept the Aqeeda-e-Tauheed-o-Risalat with full details and requirements. Therefore according to Islamic concept of nationhood,

who will accept the Aqeeda-o-Tauheed-o-Risalat with full details and requirements, he will become a member of separate and different nation and whosoever will not accept he will not be considered the member of that nation.

Islam has used the terminology of Ummah for the word Nation (Quran). It has borrowed this term from Quran and Sunnah. Mankind has been referred to in the Quran as a single Ummat and the Muslamans as the best Ummah. Pointing to the believers, the Quran states, "you are the best of the Ummats raised up for (the benefit of) men; you enjoin what is right and forbid the wrong and believe in Allah." Likewise it is related in the Hadith that "Among the Ummats, the Ummat of Muhammad (p.b.u.h.) is like the prayer of 'Asr' which is preferred to other prayer on account of its good. Besides, Ummat-e-Muslam, another terminology "Millat-e-Islamia is also used.

ISLAMIC CONCEPT OF NATIONHOOD IN THE LIGHT OF QURAN AND HADITH

(i) Quran :-

The first ever source of Islamic Law is Quran therefore all the details of Deen, Qaum and Mazhab are determined by Quran. The Holy Quran enjoins.

(1) "And hold fast altogether, by the rope which Allah (stretches out for you) and be not divided amongst yourselves. (Al. Imran).

(2) "It is He Who created you; and of you are some that unbelievers and some that are believers."

According to these verses of Quran, there live two nations in the world, one is the believer and the other one is disbeliever.

(ii) Hadith : The Holy Prophet has strongly pleaded

"There is neither preference to an Arab over a non-Arab, nor to a non-Arab over an Arab: not for white over the black nor the black over the white except in piety. Verily the noblest among you is he who is the most pious."

Another place Holy Prophet (p.b.u.h.) said:-

"He is not among us who does not follow God and his Prophet (p.b.u.h.)."

(2) TWO NATION THEORY : The International Law of Islam proceeds on the basis that there are two nations in the world, the Muslims and the non-Muslims. The person who submit absolutely to the Shariah are the Muslims. The rest of the people whether they follow the repealed and corrupted revelations or patronize the man made customs and traditions falls in the category of the disbelievers. In the eye of Islam all of them, in spite of their mutual differences, constitute one nation. There is a saying of the Holy Prophet (p.b.u.h.).

"All disbelievers are like members of a nation."

Indo-Pak sub-continent and two nation theory

Until there remained the Government of Muslims in Indo-Pak. Sub-continent, there was the concept of two nations *i.e.* Hindus and Muslims. But when the British came in this sub-continent then they tried to implement one nation theory. Hindus at that time were in the majority and also ahead in education from Muslims. So they adopted this concept for their own benefit and the so called concept of Indian Independence become the slogan All Indian National Congress. This concept has also got assistance from the newly developed democracies in the whole world. But there has born such a thinker, *i.e.*; Sir Syed and Allama Iqbal in Muslims, who not only remind the Muslims that they are separate nation but also by seeing in the eyes of Britains and Hindus said that Muslims are separate

nation and by virtue of this they deserve for separate country. Iqbal has reminded the Muslims this forgotten lesson in this way.

وہیاءِ مردوں تھا جس کا ہے وہ نامہ ہوا تارا	کبھی اسے نوجوان مسلم تہہ برجھی کیا قوت
خاص ہے قریب میں تو مرسوں ہاشمی	اپنی ملت پہ قیاس اقوام مغرب سے نہ کر
نیل سے ساحل سے پیرتا بخاک کا شفر	ایک ہوں مسلم حرمین پہ سہانی کے لیے
نہ تو رانی سے باقی نہ ایرانی نہ افغانی	تسار رنگ و خون کو تو زمرطت میں مہبوب

Dr. Allama Iqbal has explained his theories in these words.

"Europe think that religion being a private affair, the organization of the social life of the people is the responsibility of the State. It is only Islam who gave this message to the mankind that religion is neither social, nor individual, nor private, it is purely human. Its object to unite all the human beings inspite of their natural distinctions. Such a system cannot be leased on nation and race, nor it can only be private affairs it can be based on the beliefs. This is the only way by which the emotional life and thought of the mankind can be unified and brought under a uniform pattern which is essential for the Constitution and life of a nation.

Two nation theory and Quaid-e-Azam : Allama Iqbal was a thinker and Quaid was a statesmen, so whatever Allama Iqbal has thought, Quaid often applied it practically according to the circumstances. Some references are the following:-

(1) "Britains should have understand this fact that Hinduism and Islam both represent a separate and different civilizations..... Fact is that they are two different nations".

(2) "Hindustan is not a nation, neither a country. It is a sub-continent where many nations live. Among them Hindu and Muslims are two big nations."

(3) Hindu and Muslims are two separate and different collective system."

So in this way the Quaid has played his role in explanation of two nation theory.

Q. 71. Islam has got its unique International System. Discuss in details?

OR

Discuss the contribution of Islam to the Internationalising of a human society?

Ans. No doubt ancient nations did contribution to different sciences and institutions but they were notable to get rid of the narrow vision of their geographical or political nation hoods. Even ancient religion seem to have been national rather than universal and for the whole of the humanity. Nevertheless these ancient, national religion also preached in the beginning love and peace. The "Chromatic" birth and social superiority complex which is still such a vital force in some parts of Africa, America and Europe, is a result of commands of the religions they profess. On the other hand Islam has rather discarded differences of race and colour, country and language, and preached for the universal brotherhood of the faithful.

As Quran enjoins : (1) "The believers are naught else than brothers. Therefore make peace between two brothers of yours (if they happen to oppose each other) and observe your duty to God that Ye may obtain mercy." (Quran 69:10).

(2) And hold fast, all of you altogether to the cable of God and do not separate. And remember God's favour in to you; how ye were enemies and he made friendships between your hearts. So that ye became as brothers by his grace; and (how) ye were upon the brink of any abyss offer and he did save you from it. Thus God maketh clear his revelations unto you, that ye may be guided. (Idem 3:103).

(3) Lo! this, your community is one sole community and I am your lord so worship me. (Idem 31:92, of 23:53)

Islam brought unity and safeguards to individual rights and liberties and also provides at the same time for collective welfare. Its calls is not meant, from any particular country. It was an advance over what had hither to be done to internationalise human society.

FACTORS THAT HELPED ISLAM TO GOT UNIQUE INTERNATIONAL SYSTEM

(1) **BROTHERHOOD OF MAN** : A few typical quotations alone from the Quran would suffice to illustrate as to how Islam preached for universal brotherhood.

(1) . O mankind ! Be careful of your duty to you Lord, who created you from a single soul and from it created its male and from them twain hath spread a multitude of men and women.

(2) O Mankind ! Lo! we have created you from single male and female, and we have made you nations and tribes that ye may distinguish one another. Lo! The noblest of you, in the sight of God, is the one who fearth (Him) most. God is knower aware. (Idem 49:13).

(3) Mankind were but one community; then they differed, and hath it not been for a word' that had already gone forth from they Lord it had been judged between them in respect of that therein they differ. (Idem 10:20).

There are other verses addressed by the prophet to foreign rulers together with unnumberable sayings of the prophet and instances of continuous practice all through these fourteen hundred years of Islam, testify to the same effect.

(2) **HAJJ OR PILGRIMAGE** : Islam is ultra-national in its ethnological sense. The brotherhood which Islam has inculcated is truly international. In order to achieve this object of Muslim brotherhood the institution of Hajj or *PILGRIMAGE* to Mecca had been introduced. This institution played a very prominent role to bring the Muslim around the world together on one centre and inculcated in them feelings of brotherhood. It is really cosmopolitan

gathering and a complete equality of the children of Adam is nowhere else to be found.

(3) **KHILAFAT** : Another internationalising institution of Islam in is the Khaliafat (Caliphate) when the Prophet breathed his last, the Muslim in general of that time came to the conclusion that there could be only one ruler for the totality of the Muslims. Although the Muslims empire spread far and wide outside its birth place Arabia, yet practically for more than a hundred years the unity of the Muslims remain intact. Muslim all over the world subject of the Muslim State as of non-Muslim states, all recognised the caliph in Madinah or later Damascus, as the commander of the faithful. After the Umayyed dynasty of Damascus the Muslim World was divided first into two and latter even more independent states. Yet the idea, of the succession to the Prophet could not be eliminated from the Muslims. The very claim for this by more than one muslim ruler at a time supports the contention more than it contradicts it, since every one of them aspired to be the ruler of the totality of the country and totality of powers.

Nomination by the reigning caliph of his successor failing which a general election, must obviously have been and was in fact a matter of course, among the Shias as well as the Sunnis at all times.

So the above are those factors which have helped Islam to got a unique International System.

M. YUSUF M. BALUCH

